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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Appellee.*

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

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BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

JURISDICTIONAL STATEMENT

This is an appeal brought by the National Geographic Society from the decision of the Supreme Court of California upholding the imposition by the Board of Equalization of the State of California of use tax collection liability on the Society's mail-order sales to California residents.

The opinion of the Supreme Court of California is based upon a test of "slightest presence within such taxing state" without regard to the nature of such presence, a test which has never been adopted by this Court and is flatly contrary to the holding of this Court in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954) as will be illustrated hereinafter. The Su-

preme Court of California's opinion is not only contrary to *Miller Bros.*, but in light of the facts set out by stipulation, flies in the face of this Court's opinion in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967).

Substantial justice requires that the opinion of the Supreme Court of California be set aside and the opinion of the Court of Appeal of California, First Appellate District, unanimously holding in favor of the Society on March 26, 1975, be reinstated. To permit the holding of the Supreme Court of California to stand would have far reaching effects country-wide on use tax collection liability for all retail sales made by interstate mail.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at — Cal.3d —, 128 Cal. Rptr. 682 (1976) and is set forth in Appendix A. The opinion of the Court of Appeal of the State of California, First Appellate District, is unofficially reported at 121 Cal. Rptr. 77 (1975) and is set forth in Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 29 U.S.C. § 1257(2). This appeal challenges the validity of requiring the National Geographic Society (hereinafter "Society") to collect and pay over California's use tax (California Revenue and Taxation Code §§ 6201-6204, set forth in Appendix C) on its mail-order sales to California residents on the ground that imposition of use tax collection liability on such sales is repugnant to the Constitution of the United States.

In 1964 the Board of Equalization of the State of California (hereinafter "Board") notified the Society that it was obligated, under California Revenue and Taxation Code § 6203, to collect use taxes on merchandise sold by mail to California residents, and that, since the Society had not collected such taxes, it was liable for an equivalent sum under § 6204. The Society paid the assessment under protest and brought an action in the San Francisco Superior Court seeking a refund, claiming that the imposition of use tax collection liability was violative of the Due Process Clause and the Commerce Clause of the Constitution of the United States. After trial without a jury and upon stipulated facts, the Superior Court entered an amended judgment in favor of the Society and ordered the Board to refund $3,864.33.

On appeal to the Court of Appeal of the State of California, First Appellate District, this judgment was unanimously affirmed on March 26, 1975. On April 25, 1975, a petition for rehearing was denied. On appeal, the Supreme Court of California, IN BANK (sic), reversed the judgment on April 1, 1976 and remanded for entry of judgment in favor of the Board. Timely notice of appeal to this Court was filed in the Supreme Court of California on June 17, 1976. The notice of appeal is set forth as Appendix D.

As the Supreme Court of California explicitly rejected the Society's challenge to imposition of the use tax collection liability under California Revenue and Taxation Code §§ 6201-6204, this matter is appropriately brought to this Court by appeal. See, *e.g., Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685 (1965); *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965).

In the event this Court does not consider appeal the proper mode of review, the Society requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §§ 1257(3) and 2103.

QUESTIONS PRESENTED

1. Whether imposing use tax collection liability upon an out-of-state organization, which has no retail outlets or retail sales solicitors within the taxing state and whose only contact with customers in the state is through the United States mail, violates the Due Process Clause and the Commerce Clause.

2. Whether the existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the California statute (California Revenue and Taxation Code § 6362(a)) and which are dissociated from the transactions sought to be taxed, provides the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

3. Whether the "slightest presence" test formulated by the California Supreme Court conflicts with this Court's decision in *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954) and other cases decided by this Court.

4. Whether the substantiality of an out-of-state seller's mail order sales within a state attempting to impose use tax collection liability on the seller is of any significance in determining whether the imposition of the collection liability is constitutional.

STATEMENT

The Society seeks review of a holding of the Supreme Court of California in favor of the Board rendered on April 1, 1976, in an action brought by the Society to recover certain asserted use tax collection liabilities paid by the Society to the Board under protest and for a declaration of nonliability for use tax collection.

Statement of Facts

The National Geographic Society is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D. C. The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register.

The Society is exempt from federal income taxation by reason of section 501(c)(3) of the Internal Revenue Code of 1954, as amended. (28 USC § 501 (c)(3)).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly journal, the National Geographic Magazine ("Magazine"), its offerings of maps, atlases, globes, books, and through school bul-

letins, film strips, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent of the total circulation.

Membership in the Society is open to all persons. The majority of such members join the Society because they desire to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington, D.C. area. Members presently pay $8.50 a year for membership in the United States, in exchange for which they receive one year's subscription to the Magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indices); however, they do have the opportunity to purchase items published by the Society from its offices in the Washington, D. C. area.

Non-member subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $10.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June, 1972, there were approximately 872,000 member subscribers and 21,000 non-member subscribers in California.

The National Geographic Magazine is exempted from the California Sales and Use Tax as a "periodical" by the California Revenue and Taxation Code § 6362.

The Society announced offerings of maps, atlases, globes and books in the Magazine and by circulars mailed to members and subscribers from outside California. To take advantage of these offerings, an order form enclosed with the mail circulars or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in the Washington, D.C. area. Deliveries of such publications are then made through the U. S. mail directly from the Society's Washington, D.C. area offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965, the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.[1]

During the period from August 1, 1963 through May 6, 1964, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amounts of $679.20 and 2,161.85, respectively.[2]

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[1] In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two salesmen and two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970. (It should be noted that these salesmen solicit only advertising copy, which is accepted or rejected in Washington, D. C.).

[2] All local sales were regarded as *de minimus* by the California

The Society paid to the Board state and local sales taxes, plus appropriate penalties and interest, on over the counter sales described above totaling $546.20 during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising copy for the Magazine.

During the period from April 1, 1964 to September 30, 1964, the Society made sales through the U.S. mail of maps, atlases, globes and books to California residents from its Washington, D. C. area offices in the manner described above in the sum of $83,596.48.

Based upon the mail order sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability With Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	38,440.12	1,752.86

All California mail order sales were accepted in the Washington, D. C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales.

Court of Appeal and were disregarded for purposes of its decision by the Supreme Court of California.

The Society sells globes, atlases, books and maps to its members, on orders mailed from all over the world to its headquarters in the Washington, D. C. area. These mail order sales are an important means by which the Society achieves its educational and scientific purposes of increasing man's geographic knowledge of the earth, sea, sky and universe, referred to above.

How The Federal Questions Were Raised And Decided Below

The Society's Claim for Refund filed on September 27, 1966 was based on the grounds that imposition of use tax collection liability on the Society violated due process and constituted an undue burden on interstate commerce, and that the Society was not a "retailer" (as defined in California Taxation and Revenue Code, § 6203).

In its suit in the Superior Court of California, the Society also argued that the imposition of use tax collection liability on its mail-order business was in violation of the Due Process Clause and Commerce Clause of the United States Constitution for the reason that there was insufficient "nexus" between the State of California and the Society to permit the State of California to impose the use tax collection liability on the Society's out-of-state mail-order sales. The Superior Court entered judgment (and an amended judgment) in favor of the Society.

In the appeal to the California Court of Appeal, that court adopted the Society's statement of the question presented as the sole issue to be decided: "The sole question presented in this case is whether [the Society's] activities in the State of California

provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by [the Society's] gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

The court then stated the Board's contentions as follows:

> During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state. The Board contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution. [footnote omitted]
> App. B, pp. 21a-22a.

The unanimous decision of the appellate court squarely rejected the Board's contentions:

> "However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society maintained two small offices in California. A function of the Secretary and salesman in each office was to solicit businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society

> which they saw advertised in the Magazine or in mailed circulars.
>
> * * *
>
> "The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justiciable relationship between the two.
>
> "The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents."
> App. B., pp. 26a, 33a.

After the Board's petition for rehearing was denied by the Court of Appeal, the Board filed a Petition for Hearing before the Supreme Court of California.

In its opinion, the Supreme Court of California stated the question before it as follows:

> "Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices."
>
> App. A, p. 1a.

In rejecting the opinion of the Court of Appeal, the California Supreme Court formulated a principle it felt applicable to all such cases, and concluded as follows:

> "We are satisfied that from the above cited decisions the following principle can be distilled

and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

* * *

"We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the Commerce clause of said Constitution."
App. A, pp. 8a, 16a.

THE QUESTIONS ARE SUBSTANTIAL

As construed by California's highest court, the California Revenue and Taxation Code, §§ 6203 and 6204, enables the State of California to impose a use tax collection liability on any out-of-state mail order seller whenever there is the "slightest presence" of the seller in California, regardless of whether that "slight presence" has any connection with the seller's retail mail order activities. This holding by the California Supreme Court is in direct conflict with the decsions of this Court which have established the limits of local taxation of out-of-state, mail order sales. Thus, the California Court's overly broad interpretation of the "nexus" requirement established by this Court (i.e., that there must be "some definite link, some minimum connection, between the state and the * * * transaction it seeks to tax", *Miller Bros.*

Co. v. *Maryland,* 347 U.S. 340, 345) raises serious and far reaching questions as to the scope of the taxing power of any state under both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (Art. 1 § 8, cl. 3) of the United States Constitution.[3]

The Imposition Of Use Tax Collection Liability Upon An Out-Of-State Organization, Which Has No Retail Outlets Or Retail Sales Solicitors Within The Taxing State And Whose Only Contact With Customers In The State Is Through The United States Mail, Is In Violation Of The Due Process Clause And The Commerce Clause Of The United States Constitution

This Court has never upheld the imposition by a state of use tax collection liability upon a mail order seller which has no retail outlets or retail sales solicitors within the state and whose only connection with *customers* in the State is by the United States mail. *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967). There must be "some defi-

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[3] Due to the "diversities and ambiguities" of the prescribed nexus rules contained in the use tax statutes of the various states, there has long been "unpredictability [as to] the consequences of a given course of conduct from one State to another." *House Comm. on the Judiciary, Report of the Special Subcommittee on State Taxation of Interstate Commerce,* H.R. Rep. No. 565, 89th Cong., 1st Sess. 625-38 (1965). As the Special Subcommittee concluded:

> An overall view of the rules governing the circumstances in which businessmen are required to collect use taxes shows a high degree of agreement among the States in cases where the seller maintains a retail outlet or sales office in the State, or has employees soliciting orders in the State. But where other activities are carried on within the State, or property or facilities maintained there, the jurisdictional consequences vary from one State to another, and often there is no consistent pattern within a particular State. *Id.* at 637.

To permit the test of "slightest presence" as enunciated by the California Supreme Court would merely add to this confusion.

nite link, some minimum connection between a state and the * * * transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345 (1954) (emphasis added). Retail sales outlets within the state, *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359 (1941), or in-state travelling salesmen, *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335 (1944); *Scripto* v. *Carson,* 362 U.S. 207 (1960), have been held to be a sufficient "nexus" to warrant the imposition of use tax collection liability on an out-of-state seller. The indispensible element in all of these cases is the existence of local, or in-state, *sales* activities. In-state activities of the seller that are not *sales* related are said to be "dissociated" from the out-of-state sales and cannot provide the constitutionally needed nexus for taxing such sales. See *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951); *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965).

Despite the clarity of this Court's decisions, the Supreme Court of California held in the instant case that use tax collection liability may be imposed, pursuant to the California Revenue and Taxation Code §§ 6203 and 6204, on an out-of-state organization which has the *slightest* presence within the state, regardless of the nature of that presence, and which conducts *substantial* mail order sales to residents of California. The California court held that for purposes of this case a presence which was in no way related to the mail order sales satisfied the "minimal nexus" required for imposition of the collection liability. In so holding, the California Court also erroneously concluded that the *substantiality* of a seller's mail order business may be considered in determining whether the imposition of use tax collection liability is constitutional.

A. The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transaction sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales

The Supreme Court of California held that the "slightest presence" within the state, without regard to the nature of that presence, permits the state constitutionally to impose on a mail order seller the duty of collecting the use tax from mail order purchasers and the liability for failure to do so. A long line of cases in this Court, however, has held that only where the "presence"of an out-of-state seller manifests itself through retail outlets or in-state retail solicitors for the sale of tangible personalty may the state constitutionally impose such a duty; and a sharp distinction must be drawn between "mail order sellers with *retail* outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967) (emphasis added.) Moreover, if a seller's activities within the state are dissociated from the activity sought to be taxed, then no constitutionally sufficient "nexus" for imposition of the tax exists. See, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951).

The California Supreme Court concluded that since the Society maintains an "office" within California —the two offices from which the Society solicits advertising for its tax-exempt magazine—it falls within

California Revenue and Taxation Code, § 6203, and has the duty of collecting use taxes on its mail order sales. The mere existence of an "office" in California does not automatically make imposition of the use tax collection liability constitutional.[4] There must be some connection—"some definite link" in the words of *Miller Bros. Co.* v. *Maryland, supra*—between such an office and the out-of-state sales; in the instant case, that connection is lacking. The California Supreme Court in attempting to show some "slight presence" could point only to the two advertising offices. These two offices which the Society maintains in California are there solely for the purpose of

[4] In *Montgomery Ward and Co., Inc.* v. *State Board of Equalization*, 272 CA2d 723, 78 Cal. Rptr. 373 (Ct. App. 1st Dist. 1969), *cert. den.* 396 U.S. 1040 (1970), the Court struck down the California use tax on certain out-of-state sales by Montgomery Ward and clarified the nature and quality of the constitutionally required nexus between the activity to be taxed and the taxing state. The Court held that due process was violated by the State of California requiring Montgomery Ward to collect use taxes on certain of its Nevada and Oregon sales to California residents, even though Montgomery Ward operated 21 retail stores in California and maintained its regional office in California. The Court states that:

> "California may not burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. *The protection afforded and the benefits conferred must have some relationship to the transaction which the State seeks to burden.*" (emphasis supplied)

The fatal defect in the state's case was its failure to show that the intrastate activities contributed to the sales made by the border stores to residents of California. The Court stated *inter alia* that:

> "The existence of a regional headquarters in Oakland, with administrative jurisdiction over the border stores, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here. *Certainly the existence of this headquarters could not give California the right to tax or impose burdens on all sales in all states throughout the region.*" *Montgomery Ward, supra*, at 382-383. (emphasis supplied)

soliciting advertising copy, a non-tangible item, for the Society's Magazine, which is tax-exempt under California law. These offices have never served as retail outlets for any of the tangible merchandise which the Society sells in its mail order activities.[5]

The Supreme Court of California found that both the Society's magazine and the Society's mail order merchandise served the same purpose, i.e., to make information gathered by the Society available to its members. From this the court concluded that both media are *used* by California residents; therefore, the mail orders are a part of the Society's business in California. The court concluded that the Society's California business was merely "departmentalized" and, therefore, under the doctrine of *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the Society was subject to the use tax collection liability.[6]

The holding in *Sears* does not support such a conclusion. In that case, imposition of the use tax was clearly justified and reasonable since the taxpayer was fully exploiting the consumer market through sales of tangible consumer products by local retail establishments. Such a local presence involving solicitation of tangible retail sales provides an appropriate nexus to justify imposition of the use tax when coupled with qualification to do business in the state.

[5] Except for a short period of time, see p. 8, *supra*.

[6] The Court of Appeal properly reached a contrary conclusion, stating:

> • • • The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars. (App. B., p. 26a).

In *Sears,* the in-state activities which supplied the nexus for the use tax were virtually identical to the out-of-state transactions sought to be taxed; the same products were sold to Iowa customers in both the mail order operation and the local retail operation, both being related to the same overall sales effort. In this case there is no similarity between the purchase of advertising space by industrial firms in the Society's exempt magazine (such sales to be consummated in Washington) and its sale of globes, books, maps and atlases by mail order in interstate commerce to California residents. The Society's solicitation of advertising is certainly not a retail function, and the facts of this case bear no resemblance to those in *Sears.*

As noted above, in the *Sears* case, the finding that mail order sales in Iowa were part of Sears' course of business in that state was clearly dependent upon the fact that Sears was qualified to do business in Iowa as a foreign corporation. The Court stated that Sears could not be reached for use tax if it were not qualified to do business in Iowa, because of the impotence of the state power, and recognized that other mail order firms not doing business as foreign corporations in Iowa could not constitutionally be subjected to this use tax.

A primary corporate purpose of the Society is to promote "the increase and diffusion of geographic knowledge." Necessarily, both the magazine and mail order merchandise sold by the Society attempt to accomplish that purpose. The California court's attempt to establish a connection between the magazine advertising solicitation activities of the Society's Cali-

fornia offices and the Society's mail order sales because of this similarity in purpose ignores the separately distinct nature and dissociation of the two activities. An excise tax case, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), is more analogous to the instant case than is *Nelson* v. *Sears, Roebuck & Co., supra,* and provides the best guidance in the situation where in-state activities are totally dissociated from out-of-state sales.

In *American Oil,* this Court held that due process was violated by the imposition of an Idaho excise tax on gasoline sold by an oil company where the incidence of the tax fell upon the company, and where the solicitation and acceptance of the sales contract occurred outside Idaho, and the delivery and transfer of title took place outside of that state, even though the company knew the purchaser had arranged for the gasoline to be brought into the state from the place of delivery for storage. The oil company was a licensed dealer and maintained offices in the taxing state of Idaho, but there was no indication that the company's activities in that state contributed in any way to the procurement or performance of the contract. This Court used the following language:

> These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite of state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-345, 98 L ed at 748. Granted that when a corporation, pursuant to permission given, enters

> a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances the transactions are said to be 'dissociated from the local business', Norton Co. v. Department of Revenue, supra, 340 U.S. at 537, 95 L ed at 521, [Gross Receipts Tax], and therefore may not, consistent with due process, be taxed. 380 U.S. at 458.

The California Supreme Court attempted to distinguish *American Oil,* on the grounds that in *American Oil,* the seller was not "responsible" for shipping the motor fuel into the State, whereas, in the instant case, the Society was responsible for placing the merchandise into interstate commerce for in-state destination. This is a meaningless distinction: in both cases, the *sales* are wholly out-of-state and are not reachable by an in-state *sales, use or excise* tax. The fact that the Society used an interstate facility to ship merchandise to an in-state purchaser after an out-of-state sale had been completed, changes nothing. The relevant question in both cases is whether there were sufficient in-state activities of the seller to tax the out-of-state sales of that seller. This Court expressly recognized this point as being decisive in *American Oil:*

> "* * * it is plain that neither Utah Oil's position as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale

> vis-a-vis Idaho and entirely unconnected with its business in that state."
>
> 380 U.S. at 458.

The Society's mail order business is similarly "dissociated" from the in-state advertising solicitation by its California offices. There is no overall sales effort connecting the in-state and out-of-state activities such as existed in the *Sears* case. Indeed, the Society's California offices engage in absolutely no retail activities which are related to the mail order sales of the Society's merchandise.

The Supreme Court of California also pointed to, but misconstrued, this Court's recent decision in *Standard Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560 (1975), as supportive of its decision in the instant case. In that case the out-of-state seller's contact with the taxing state was the presence therein of one full-time engineer. The engineer, however, worked closely with the in-state customer and advised the customer as to what products it needed from the seller. Although the engineer did not take sales orders himself, by advising the customer as to its needs, he occupied a role little different from the travelling salesmen in *General Trading Co.* v. *Tax Commission,* 322 U.S. 335 (1944), or the local brokers, wholesalers and jobbers in *Scripto* v. *Carson,* 362 U.S. 207 (1960). The personnel in the Society's California offices have no contact of any kind with mail order customers of the Society, for the simple reason that those offices have no retail function related to mail order sales.

As pointed out earlier in footnote 4, *supra,* the holding of the California Supreme Court in the in-

stant case is also in conflict with the California Court of Appeal's decision in *Montgomery Ward & Co.* v. *Board of Equalization,* 272 Cal. App. 2d 728 (1969), *cert. denied,* 396 U.S. 1040 (1970) (in which review was denied by the California Supreme Court and this Court). In the instant case, the California Supreme Court attempted to dismiss the holding in *Montgomery Ward* on the basis of its misreading of the facts therein. In *Montgomery Ward,* there was clear adherence to the principle that the transaction sought to be taxed must bear *some* relation to the in-state activities of a business in order for a state to constitutionally impose a use tax collection liability. This point was ignored by the California Supreme Court in its opinion rendered in the instant case. In truth, the facts of *Montgomery Ward* insofar as the transactions sought to be taxed are concerned are almost a letter copy of *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954).

B. The "Slightest Presence" test formulated by the California Supreme Court is in conflict with this Court's decision in Miller Bros. Co. v. Maryland

In *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954), this Court specifically rejected the imposition of use tax collection liability by Maryland on a Delaware seller who was found to have some "presence" within Maryland. The case arose because Maryland seized one of Miller Bros.' trucks which was making deliveries to Maryland residents. The sales in question had been made to Maryland residents who had gone to Miller Bros.' Delaware store. Some of the purchases were carried back to Maryland by the purchasers, some were delivered to the purchasers' Maryland residences by common carrier, and some were delivered to the purchasers' Maryland residences by a Miller Bros. delivery truck. The "presence" in Maryland of Miller Bros. own truck to complete out-of-state sales by delivery was found by this Court to be an insufficient connection between Maryland and Miller Bros. to uphold Maryland's imposition of use tax collection liability.

The "slightest presence" test of the California Supreme Court exceeds the limit set by this Court on permissible state taxation. If allowed to stand, the mere passage through a state by a company official could result in that state taxing an otherwise wholly out-of-state concern on the grounds that the concern, through its company official, was "present" within the state. Or, in the case of the Society, the presence of writers and photographers from the Society within a state could be regarded as "presence" sufficient to tax the Society by that state. Such state action would be clearly contrary to *Miller Bros. Co.* v. *Maryland,* and accordingly, the "slightest presence" test should be set aside by this Court.

C. The substantiality of an out-of-state seller's mail order business within a state attempting to impose use tax collection liability on the seller is of no significance in determining whether imposition of the tax liability is constitutional

Analysis of the opinion of the Supreme Court of California in this case demonstrates that the court placed heavy emphasis and reliance on the substantiality of the Society's mail order activity in concluding that sufficient nexus existed between the Society and the State of California so as to constitutionally justify the imposition of use tax collection

liability. Nowhere in the California Revenue and Taxation Code is it stated that the substantiality of a seller's business is the determining factor as to when use tax liability shall exist; nor do any decisions of this Court indicate that the volume of an out-of-state seller's mail order business is of any constitutional significance.

Nevertheless, the Supreme Court of California makes much of the fact that the Society's mail order activity in California is substantial: "In the instant case, the Society conducts a widespread business with California residents. As of June 1972, it had 872,000 "members" in California who subscribed to its Magazine; additionally it received 21,000 nonmember subscriptions in California. During one nine-month period its mail order sales of maps, atlases, globes and books (exclusive of the Magazine) to California residents amounted to $452,470." The "rule" formulated by the California court incorporates the substantiality of the seller's mail order business as an indicia of "nexus" for imposition of the use tax collection liability: "Where an out-of-state seller conducts a *substantial* mail order business with residents of a state imposing a use tax on such purchasers . . ." (emphasis added).

Yet this Court has rejected the argument that the volume of an out-of-state seller's mail order business provides a constitutionally sufficient nexus for imposition of the tax liability. The dissent in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967), argued that the "large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is sufficient 'nexus' to require Bellas

Hess to collect . . . and to remit the use tax . . ." 386 U.S. at 761-762. The majority clearly rejected this reasoning. To hold that volume of sales alone provides a sufficient "nexus" would be to completely ignore the purpose of the Commerce Clause.

CONCLUSION

In light of the foregoing, we respectfully urge that this Court note probable jurisdiction of the appeal applied for herewith. In furtherance of the noting of jurisdiction, this Court might well wish to follow the route that it took in the recent case of *Diamond National Corporation* v. *State Board of Equalization,* in No. 75-1038, decided April 19, 1976, by directing a Per Curiam reversal of the Supreme Court of Califormnia in this case and a reinstatement of the opinion of the Court of Appeal, First Appellate District.

It may be, however, that this Court will wish to review this case in detail because of the wide-spread effect a complete opinion on same would have in settling this problem in every state in the United States. Should that be the course followed, we would respectfully conclude herewith by stating once again that the State of California has provided no protection or benefits with respect to the Society's out-of-state, mail-order sales. No link can be established between the Society's in-state solicitation of advertising copy and the out-of-state sales, as the solicitation of advertisements had no effect upon whether California residents would purchase products of the Society which they saw announced in the Magazine or in the mailed circulars. The California Court of Appeal correctly held that the constitutionally re-

quired "minimal nexus" was lacking and thus use tax collection liability could not be properly imposed on the Society's mail-order sales to California residents. The decision of the California Supreme Court to the contrary is without basis and should be set aside by this Court and the decision of the Court of Appeal be allowed to stand.

Respectfully submitted,

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APPENDIX

APPENDIX A

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

STATE BOARD OF EQUALIZATION, *Defendant and Appellant.*

S. F. 23295.

Supreme Court of California,
In Bank.
April 1, 1976.

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SULLIVAN, *Justice.*

Defendant Board of Equalization of the State of California (Board) appeals from a judgment entered in favor of plaintiff National Geographic Society (Society) ordering that defendant refund certain use taxes to plaintiff. Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices.

The case was tried by the court, sitting without a jury, and upon a written stipulation of facts. In words and substance the pertinent facts are as follows. The Society is a nonprofit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located in Washington, D.C. It is exempted from the payment of federal income taxes.[1] The stated objective of the Society is "the increase and

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[1] Under 26 United States Code section 501(c)(3), as amended. (Internal Rev.Code.)

diffusion of geographic knowledge." It supports exploration and research projects dedicated to increasing man's knowledge of the earth, sea, sky and universe. The scientific and educational information obtained is made available to the members and subscribers through the National Geographic Magazine (hereinafter the "Magazine") and offerings of maps, atlases, globes, books, school bulletins, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, book dealers and corporations.[2] Membership is open to all persons; the majority of members join in order to obtain the Magazine. They pay $7.50 a year for membership for which they receive one year's subscription to the Magazine.[3] As of June 1972 there were approximately 872,000 member subscriptions and 21,000 nonmember subscriptions in California. The Magazine is exempted from California sales and use taxes as a "periodical" under Revenue and Taxation Code section 6362.[4]

The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D.C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the

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[2] These represent less than 5 percent of total circulation.

[3] Nonmember subscribers such as schools, libraries, bookdealers and corporations pay $9 a year.

[4] Hereafter, unless otherwise indicated, all section references are to the Revenue and Taxation Code.

purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D.C. offices. Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

Since 1956, the Society has maintained two offices in California—one in San Francisco and one in Los Angeles. During the tax periods in controversy there were two employees in each office; later, there were four in each office. During the period from August 1, 1963, through May 6, 1964, these two offices sold maps, atlases, globes and books, of the type described above as mail order merchandise, over the counter to any individual requesting them.[5] At all other times, these offices made no sales and confined their activities to the solicitation of advertising for the Magazine.

During the period from April 1, 1964, to September 30, 1964, the Society made sales of maps, atlases, globes and books to California residents in the sum of $85,596.48 through mail orders. The Board notified the Society that it was obligated, under section 6203, to collect the use taxes on this merchandise and that since it had not done so, it was liable for an equivalent amount under section 6204. The Society paid the assessment for the above two quarters of 1964 under protest and brought this action for a refund. The total state and local use tax collection liability with interest and penalties was the sum of $3,838.76.[6]

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[5] The over-the-counter sales had a total value of $2,841.05. The value of the merchandise sold to California residents by mail order during the same period was $452,470. The Society paid state and local sales taxes, plus penalties and interest upon sales totalling $546.20 during the period April 1, 1964, to May 6, 1964. It seeks no refund of this amount.

[6] Although it is not in the stipulated facts, documents in the record and the briefs on appeal reveal that the total asserted tax

[1] The use tax is a natural companion to the sales tax since it is complementary to the latter. (*Miller Bros. Co.* v. *Maryland* (1954) 347 U.S. 340, 343, 74 S.Ct. 535, 98 L.Ed. 744; *Nelson* v. *Sears, Roebuck & Co.* (1940) 312 U.S. 359, 361, 61 S.St. 586, 85 L.Ed. 888; *Chicago Bridge & Iron Co.* v. *Johnson* (1941) 19 Cal.2d 162, 165-166, 119 P.2d. 945, quoting from *Southern Pacific Company* v. *Gallagher* (1938) 306 U.S. 167, 171, 59 S.Ct. 389, 83 L.Ed. 586.) "The use tax . . . usually appears as a support to the sales tax in two respects. One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices." (*Miller Bros. Co.* v. *Maryland, supra,* 347 U.S. at p. 343, 74 S.Ct. at p. 538). It is well settled that a state may constitutionally impose directly upon resident purchasers a tax for the privilege of using goods within the state. "The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' . . ." (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 363, 61 S.Ct. 586, 588, 85 L.Ed. 888). The constitutionality of California's exaction of the tax has been clearly upheld. (*Union Oil Co.* v. *State Bd. of Equal.* (1963) 60 Cal.2d 441, 457-459, 34 Cal.Rptr. 872, 386 P.2d 496, appeal dismissed 377 U.S. 404, 84 S.Ct. 1629, 12 L.Ed.2d 495).

However, the collection of the use tax directly from each resident purchaser has presented a difficult, if not insuperable, administrative problem for the taxing state. As a consequence, many states have sought to impose upon an out-of-state seller liability to collect a local use tax (see *Nat. Bellas Hess* v. *Dept. of Revenue* (1966) 386 U.S. 753, 757, 87 S.Ct. 1389, 18 L.Ed.2d 505). California has met the problem in the same way. The use tax in this state is an excise tax "on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer . . . for storage, use, or other consumption in this state. . . ." (§ 6201.) "Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State . . . ." (§ 6202.) Section 6203 requires "every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state" to collect the tax from the purchaser. A "retailer engaged in business in this state" is defined in section 6203 and includes "[a]ny retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business." Section 6204 provides that the tax required to be collected by the retailer constitutes a debt owed by the retailer to the state.

It is the position of the Board that since the Society maintains an "office" or "other place of business" within California—namely its two offices from which it solicits advertising for the Magazine—it falls within section 6203 and has the duty of collecting use taxes on goods sold through mail orders to California residents. It is the position of the Society, on the other hand, that the imposition of a use tax collection liability under such circumstances is in violation of the due process clause of the Fourteenth Amendment to, and of the commerce clause (art. I, § 8, cl. 3) of, the United States Constitution.

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liability exceeds $180,000 and covers a period of nine years. The Board agreed to postpone collection of the remainder until this action determined the constitutionality of the asserted liability.

The Society paid the taxes for the two consecutive quarters covering April 1, 1964, to June 30, 1964, and July 1, 1964, to September 30, 1964. These periods were chosen to represent the two different degrees of in-state activity (i.e. with and without the over-the-counter sales of the mail order merchandise.) Since we hold that the collection liability may be imposed without *any* over-the-counter sales, we do not consider these sales further.

The criteria for determining the validity of such liability in the light of the above two-pronged constitutional attack were set forth in *Nat. Bellas Hess* v. *Dept. of Revenue, supra,* 386 U.S. 753, 756-57, 87 S.Ct. 1389, 1391, 18 L.Ed.2d 505: "These two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See *Central R. Co.* v. *Pennsylvania,* 370 U.S. 607, 621-622, 82 S.Ct. 1297, 1306-1307, 8 L.Ed.2d 720 (concurring opinion of MR. JUSTICE BLACK). As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' *Freeman* v. *Hewit,* 329 U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265. See also *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633; *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462, 79 S.Ct. 357, 364, 3 L.Ed.2d 421. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the State has given anything for which it can ask return.' *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267. See also *Standard Oil Co.* v. *Peck,* 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; *Ott* v. *Mississippi Val. Barge Line,* 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744; *Scripto, Inc.* v. *Carson,* 362 U.S. 207-210-211, 80 S.Ct. 619, 621-622, 4 L.Ed.2d 660 [Fn. omitted.]

See also *American Oil Co.* v. *Neill,* 380 U.S. 451, 458, 85 S.Ct. 1130, 1134, 14 L.Ed.2d 1." More recently in a case involving a business and occupation tax levied on the unapportioned gross receipts from sales, the high court again quoting the same language from *Wisconsin* v. *J. C. Penney Co.* (1940) 311 U.S. 435, 444, 61 S.Ct. 246, 85 L.Ed. 267, pointedly declared that "the question is 'whether the state has given anything for which it can ask return.' " (*Standard Steel Co.* v. *Wash. Revenue Dept.* (1974) 419 U.S. 560, 562, 95 S.Ct. 706, 708, 42 L.Ed.2d 719.)

It is clear that where the out-of-state mail order seller's connection with the taxing state is *solely* by instruments of interstate commerce—e.g., by common carrier or the United States mail—the state has given nothing for which it can ask return. Indeed in *Nat. Bellas Hess,* the Supreme Court took pains to point out that it "has never held that a State may impose the duty of use tax collection and payment" under such circumstances. (386 U.S. at p. 758, 87 S.Ct. at p. 1392.) Accordingly it held that Illinois could not constitutionally impose a use tax collection liability upon a mail order house whose principal place of business was in Missouri and whose only contacts with Illinois were by United States mail or common carrier since in the circumstances of that case it would amount to a tax on the privilege of doing interstate business and would be violative of the commerce clause.

Where, on the other hand, the out-of-state mail order seller, although effecting its sales through instruments of interstate commerce, has retail outlets in the taxing state albeit the mail orders were neither solicited nor placed by any of its agents therein (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888), or has local retail outlets and in addition has solicited the mail order sales through local advertisement but not by local agents (*Nelson* v. *Montgomery Ward* (1941) 312 U.S. 373, 61 S.Ct. 593, 5 L.Ed. 897) or, having no local office or place

of business, nevertheless has solicited the mail order sales by its travelling salesmen sent into the taxing state (*General Trading Co.* v. *Tax Comm'n* (1944) 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309) or has solicited them only through local brokers, wholesalers or jobbers compensated on a commission basis (*Scripto* v. *Carson* (1960) 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660), the use tax collection liability has been upheld. On this crucial issue of jurisdiction to tax, we think the most recent ruling in the *Standard Steel* case, although involving a business and occupation tax, is not only germane but highly significant. There the court declared that it "verges on the frivolous" to contend that the state had not given anything for which it could ask return where the only connection of the out-of-state seller with the taxing state, other than through instruments of interstate commerce, was the presence therein of one full time engineer who advised the seller's purchaser with regard to its needs for a certain product ordered directly by mail to the seller and shipped directly to the purchaser by common carrier. (*Standard Steel Co.* v. *Wash. Revenue Dept., supra,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719.)

[2] We are satisfied that from the above cited decisions the following principle can be distilled and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is *not* exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.

[3] In the instant case, the Society conducts a widespread business with California residents. As of June

1972, it had 872,000 "members" in California who subscribed to its Magazine; additionally it received 21,000 nonmember subscriptions in California. During one nine-month period its mail order sales of maps, atlases, globes and books (exclusive of the Magazine) to California residents amounted to $452,470. There can be no question as to the Society's presence in California independent of any connection with this state through interstate commerce. It maintained in this state two offices from which employees solicited advertising for the Magazine; clearly these offices provided sufficient activities within California, receiving from this state protection and benefits "for which it can ask return." (*Wisconsin* v. *J. C. Penney Co., supra,* 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267.) Indeed the Society concedes that it has never been its position in this case that the tax did not apply because of the insubstantiality of the Society's activities in California. In light of the cases and principle set forth above, California had the jurisdiction to impose on the Society a use tax collection liability in respect to its mail order sales to California residents of the articles referred to.

[4] It is this conclusion which is the target of the Society's constitutional attack. The Society contends that its activities in California are so "dissociated" from the mail order activities sought to be taxed that there is "no justiciable relationship between the two." These in-state activities—namely the solicitation of advertising for the Magazine—bear no relation whatsoever to the mail order sales of goods; the solicitation of advertisements neither informs the subscribers of the goods in question nor induces them to purchase the goods.[7]

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[7] The Society also contends that the in-state activities of the Magazine cannot be used to determine whether there is a nexus sufficient to allow the imposition of the collection obligation. This argument is based upon misinterpretation of the tax exemption for periodicals, such as the Magazine provided in section 6362 of the Revenue and Taxation Code.

Our attention has not been directed to, nor have we found, any controlling appellate decision holding in circumstances reasonably approximating those of the case at bench that the imposition of a use tax collection liability on a mail order seller is constitutionally impermissible under the due process clause or the commerce clause of the United States Constitution because the in-state activities of such seller are "dissociated" from its mail order activities. Such a thesis, we think, would cut across the doctrinal principles running through the fabric of authorities discussed in the first part of this opinion. More particularly, it must collapse under the rationale and holding of *Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888.

In *Sears, Roebuck,* the taxpayer, a New York corporation, had retail stores in Iowa and in addition conducted a mail order business directly between customers in Iowa and the taxpayer's mail order houses located outside Iowa. Sears, Roebuck contended, and the Iowa Supreme Court held, that these mail order sales were "separate and distinct" from the taxpayer's activities in Iowa. The state court concluded that although the use tax was on the purchaser nevertheless since it had to be collected when the sale was made and the property was outside the state, Iowa lacked the power to regulate such activities and its imposi-

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The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power.

Section 6362 exempts periodicals and and tangible personal property which becomes an ingredient or component part of a periodical. The statute does not in any way exempt the presence of the Society in the state when it is related to the Magazine. The statute cannot be construed to prevent the tax obligation the state seeks to impose here.

tion of use tax collection liability was unconstitutional. The Supreme Court rejected this argument of "dissociation" and reversing, upheld the use tax collection liability as constitutional. We quote somewhat at length from the opinion of Mr. Justice Douglas for the court because it at once resolves the central constitutional argument before us and answers the cluster of arguments presented by the Society to support its claim of dissociation: "The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate.' *Wisconsin* v. *J. C. Penney Co., supra,* [311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267]. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' *Henneford* v. *Silas Mason Co.,* 300 U.S. 577, 583, 57 S.Ct. 524, 527, 81 L.Ed. 814; *Southern Pacific Co.* v. *Gallagher, supra,* [306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586]. It is one of the well-known functions of the integrated use and sales tax to remove the buyers' temptation 'to place their orders in other states in the effort to escape payment of the tax on local sales.' *Henneford* v. *Silas Mason Co., supra,* 300 U.S. p. 581, 57 S.Ct. at p. 526, 81 L.Ed. 814. As pointed out in that case (300 U.S. p. 582, 57 S.Ct. at p. 526, 81 L.Ed. 814), the fact that the buyer employs agencies of interstate commerce in order to effectuate his purchase is not material, since the tax is 'upon the privilege of use after commerce is at an end.' . . .

"So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86, 54 S.Ct. 575, 78 L.Ed. 1141, and *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activ-

ity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.' *Wisconsin* v. *J. C. Penney Co., supra.* Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. *Wisconsin* v. *J. C. Penney Co., supra.* Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." (*Sears, Roebuck, supra,* at pp. 363, 364, 61 S.Ct. at p. 588.)

Like Sears, Roebuck in the cited case, the Society in the instant one is a single business entity conducting its course of business in California. Here, as there, its mail orders are part of its California business. We observe no basic dissimilarity between the Magazine on the one hand and the maps, atlases, globes and books on the other. Both the Magazine and the latter mail order merchandise are ordered, paid for and delivered in essentially the same way. The Magazine and the merchandise are remarkably similar in nature, function and purpose. We can discern no significant difference between a periodical which deals with geography and maps, atlases, globes and books which obviously cover the same field of knowledge. Nor can we detect any fundamental difference in function—both the Magazine and the merchandise make information gathered by the Society available to its members. Overall and common to both is the pervasive purpose of the Society to further

"the increase and diffusion of geographic knowledge." The final result of the Society's course of business is the *use* by California's residents of all of the above media of knowledge. In short, the mail orders are a part of the Society's business in California. As in *Sears, Roebuck,* the Society cannot avoid its use tax collection liability by claiming that its California business is departmentalized. We reject as of no constitutional relevance its claim that its in-state activities are "dissociated" from its mail order activities.

The Society insists that authoritative support for its claim of dissociation can be found in *American Oil Co.* v. *Neill* (1964) 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1, and *Montgomery Ward & Co.* v. *State Board of Equalization* (1969) 272 Cal.App.2d 728, 78 Cal.Rptr. 373. We disagree. The Society misconstrues the holding of these cases—neither asserts a "dissociation" between the nature of the in-state activities and the nature of the activities of the business entity sought to be taxed, but rather each holds that there is a defect in the relationship between the state and the event to be taxed.

In *American Oil* American's predecessor in interest, Utah Oil Refining Company, was a Delaware corporation authorized to do business in Idaho. That state imposed an excise tax on all motor fuels received in the state, taxing the dealer as the person first receiving the fuels and also holding him liable as a constructive recipient of fuels sold by him outside the state for in-state use by an unlicensed purchaser. Upon acceptance of bids transmitted from its office in Salt Lake City, Utah Oil sold gasoline to the Atomic Energy Commission (A.E.C.) for delivery in Utah at a designated price f. o. b. Salt Lake City. The A.E.C. then transported the fuel by common carrier, selected and paid by A.E.C., to Idaho where it was stored in A.E.C.-owned tanks. Utah Oil sold the gasoline, knowing it would be imported into and used in Idaho.

The Supreme Court held that Idaho's imposition of the excise tax could not be upheld as against attack under the due process clause: "In the present case it is plain that neither Utah Oil's position as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale vis-a-vis Idaho and entirely unconnected with its business in that State. *Each and every phase of the transaction had its locus outside of Idaho: . . .*" (*American Oil Co.* v. *Neill, supra,* 380 U.S. at p. 458, 85 S.Ct. at p. 1135; italics added.) The essence of the holding is that the taxed event was the sale of gasoline in Utah and neither (1) Utah Oil's knowledge that the A.E.C. would later import the gasoline into Idaho nor (2) Utah Oil's being licensed as a dealer there was sufficient to bring the transaction within the taxing power of Idaho. As the italicized language, *supra,* makes clear, the sale was beyond the taxing power of Idaho because Utah Oil had nothing to do with the interstate transportation of the gasoline into that state.

This situation is distinguishable from the one at bench where the Society *was* entirely responsible for shipping the mail order merchandise into California for use there by the purchasers, the mail orders being part of the Society's course of business in this state. (*Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 364, 61 S.Ct. 586, 85 L.Ed. 888). *American Oil* is not authority, as the Society would have it, for a "dissociation" between its in-state activities and its mail order activities in a use tax context. The Society ingeniously attempts to make the concept of "dissociation" employed in sales tax gross receipts tax cases (see for example, *Norton* v. *Dept. of Revenue* (1951) 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517) spill over into the use tax field. As the high court made clear in *Norton,* the impact of the use tax "is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor." (*Id.,* at p. 537, 71 S.Ct. at p. 380, citing inter alia

Nelson v. *Sears, Roebuck & Co., supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, and *Nelson* v. *Montgomery Ward, supra,* 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897.)

Nor does *Montgomery Ward & Co.* v. *Board of Equalization, supra,* 272 Cal.App.2d 728, 78 Cal.Rptr. 373, assist the Society. There the Board attempted to impose a *use* tax collection liability on Montgomery Ward for over-the-counter sales made for cash or credit to California residents at its stores in Oregon and Nevada. In support of the liability, the Board relied on (1) a nexus between the state and the taxpayer by reason of the latter's retail stores in California and (2) the taxpayer's knowledge that the goods would be used in California by reason of the customer's address on his charge account. The use tax collection liability was struck down as violative of the due process, equal protection and commerce clauses of the United States Constitution.

It is noteworthy that the decision did not rest on a lack of nexus between the state and the taxpayer. The presence of retail outlets in California would clearly provide a basis for use tax collection liability in respect to merchandise delivered or mailed directly into California. (*Nelson* v. *Montgomery Ward, supra,* 312 U.S. 373, 61 S.Ct. 593, 85 L.Ed. 897.) The constitutional defect lay in the lack of certainty of the connection between the seller's activities and the event to be taxed, namely the use. In *Nelson* the certainty of use in the taxing state was guaranteed by the seller's own actions, namely mailing the goods directly to the purchaser. However, unless the seller by his own actions makes certain the taxable use, e. g. by sending or delivering the merchandise into the taxing state, he cannot be required to collect the tax.

In *Miller Bros.* v. *Maryland, supra,* 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744, Maryland likewise tried to impose a use tax collection liability on out-of-state over-the-counter sales in Delaware. There the out-of-state seller had no in-state

retail stores so that a constitutional problem was presented as to substantiality of contacts between Maryland and the Delaware business entity. The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto* v. *Carson, supra,* 362 U.S. 207, 212, 80 S.Ct. 619, 4 L.Ed.2d 660, the Supreme Court declared that "it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection to uphold a tax against attack under the due process clause. (*American Oil Co.* v. *Neill, supra,* 380 U.S. 451, 457, 85 S.Ct. 1130, 14 L.Ed.2d 1.)

The same result was reached on the same facts by the court in *Montgomery Ward & Co.* v. *Board of Equalization, supra,* 272 Cal.App.2d 728, 78 Cal.Rptr. 373: The out-of-state over-the-counter sales for cash or credit cannot support the imposition of a use tax collection obligation on the out-of-state seller on all goods ultimately used in California. In the case at bench, therefore, since the Society sends all its merchandise directly to the resident purchasers in California, *Montgomery Ward* is inapposite.

We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the commerce clause of said Constitution.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment for defendant Board of Equalization.

WRIGHT, C. J., and MCCOMB, TOBRINER, MOSK, CLARK and RICHARDSON, JJ., *concur.*

APPENDIX B

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

BOARD OF EQUALIZATION of the State of California, *Defendant and Appellant.*

Civ. 35629.
Court of Appeal, First District, Division 2.
March 26, 1975.

Hearing Granted June 4, 1975.

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BRAY, Associate Justice.•

Defendant Board of Equalization of the State of California (hereinafter "Board") appeals from the judgment of the San Francisco Superior Court in favor of plaintiff National Geographic Society (hereinafter "Society").

Issue Presented:

Plaintiff's in-state activities do not provide sufficient nexus to make it liable for use taxes on materials purchased by California residents through mail orders to plaintiff's out-of-state office.

Record:

Plaintiff filed a complaint against defendant for refund of certain use taxes paid under protest. After trial before the court, without a jury, upon a stipulation of facts the court filed an amended judgment[1] ordering defendant to refund to plaintiff $3,864.33 together with interest. Defendant appeals.

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[1] The court first filed a judgment and then an amended judgment. As the amended judgment superseded the original judgment we consider herein only the amended judgment.

Stipulated Facts:

The National Geographic Society is a nonprofit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D.C.

The Society is exempted as an organization from the payment of federal income taxes under Internal Revenue Code, section 501, subdivision (c), subsection (3) as amended.

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly National Geographic Magazine (hereinafter "the Magazine"), its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports.

The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than 5 percent of total circulation.

Membership in the Society is open to all persons. The majority of such members joined the Society because they desired to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington area. Members presently pay $7.50 a year for membership in exchange for which they receive one year's subscription to the Magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indexes); however, they

do have the opportunity to purchase items published by the Society from its offices in Washington, D.C.

Nonmember subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $9.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June 1972, there were approximately 872,000 member subscriptions and 21,000 nonmember subscriptions to the Magazine in California.

[1] The Magazine is exempted from California sales and use taxes as a "periodical" under Revenue and Taxation Code section 6362.

The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D. C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D. C. offices.

Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965,

the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.

During the period from August 1, 1963 through May 6, 1964, maps, atlases, globes and books of the type described above were sold to individuals over the counter from the San Francisco and Los Angeles offices of the Society totalling a sales' value as follows:

San Francisco	Los Angeles
$679.20	$2,161.85

In comparison with local sales as tabulated in the foregoing schedule, the shipment of maps, atlases, globes and books exclusive of the Magazine to California Society members and residents from orders received at the Washington, D. C. office during the same period totalled a sales' value of $452,470.00.

With regard to the sales of maps, atlases, globes and books from the San Francisco and Los Angeles offices of the Society as described above, the offices did not verify whether or not a prospective purchaser was a member of the Society and sales could have been made to individuals who were neither members nor subscribers.

The Society paid to the Board state and local taxes plus appropriate penalties and interest upon sales totalling $546.20 described above, during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising for the Magazine.

During the period from April 1, 1964 to September 30, 1964 the Society made sales of maps, atlases, globes and

books to California residents from its Washington, D. C. offices in the manner described above in the sum of $83,596.48.

Based upon the sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability with Interests and Penalties
4/1/64—6/30/64	$45,156.36	$2,085.90
7/1/64—9/30/64	38,440.12	1,752.86
	$83,596.48	$3,838.76

Plaintiff is not liable for the use taxes.

As stated in appellant's opening brief: "The sole question presented in this case is whether respondent's activities in the State of California provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by respondent's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state.[2] The Board

[2] The section involved is Revenue and Taxation Code section 6203: "Except as provided by Sections 6292 and 6293 every re-

contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution.

[2] Basically the California use tax statute seeks to make out-of-state sellers collect use taxes on items sold to California residents for use, storage or consumption in this state. It is the consumer who is taxed, but the retailer is liable for an amount equivalent to the tax due to his statutorily imposed duty to collect the tax. (Rev. & Tax. Code § 6203; Montgomery Ward & Co. v. State Bd. of Equalization (1969) 272 Cal.App.2d 728, 742-743, 78 Cal. Rptr. 373; cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684.)

One of the most recent Supreme Court cases on the question of whether imposition of a use tax liability violates the due process clause and the commerce clause states: "These

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tailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. [¶] As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease. [¶] 'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following: [¶] (a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business. [¶] (b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property. [¶] (c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state."

two claims are closely related. For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this area are similar. See Central R. Co. of Pa. v. Commonwealth of Pennsylvania, 370 U.S. 607, 621-622, 82 S.Ct. 1297, 1306-1307, 8 L.Ed.2d 720 (concurring opinion of Mr. Justice Black). As to the former, the Court has held that 'State taxation falling on interstate commerce • • • can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys.' Freeman v. Hewit, 329 U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265. See also Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663, 68 S.Ct. 1260, 1266, 92 L.Ed. 1633; Northwestern States Portland Cement Co. v. State of Minnesota, 358 U.S. 450, 462, 79 S.Ct. 357, 364, 3 L.Ed.2d 421. And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267. See also Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; Ott v. Mississippi Val. Barge Line Co., 336 U.S. 169, 174, 69 S.Ct. 432, 434, 93 L.Ed. 585. The same principles have been held applicable in determining the power of a State to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. State of Maryland, 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744; Scripto, Inc. v. Carson, 362 U.S. 207, 210-211, 80 S.Ct. 619, 621-622, 4 L.Ed2d 60. See also American Oil Co. v. Neill, 380 U.S. 451, 458, 85 S.Ct. 1130, 1134, 14 L.Ed.2d 1." (Nat. Bellas Hess v. Dept. of Revenue (1967) 386 U.S. 753, 756-757, 87 S.Ct. 1389, 1391, 18 L.Ed. 2d 505.)

The concept of some nexus, some minimum connection between the state and the person, property or transaction it seeks to tax is reiterated again and again in the cases. In American Oil Co. v. Neill (1965) 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1, the court restated this concept, but stated that even where a corporation has *some* in-state contacts, the corporation could exempt itself from use tax liability by a showing that no connection in reality existed between the in-state activities and the out-of-state sales. "These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. State of Maryland, *supra,* 347 U.S. at 344-345, 74 S.Ct. [535] at 539. Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be 'dissociated from the local business,' Norton Co. v. Department of Revenue, *supra,* 340 U.S. [534] at 537, 71 S.Ct. [377] at 380, [95 L.Ed. 517], and therefore may not, consistent with due process, be taxed." (American Oil Co. v. Neill, *supra,* at p. 458, 85 S.Ct. at p. 1134.)

And in Montgomery Ward & Co. v. State Bd. of Equalization, *supra,* 272 Cal. App.2d 728, at p. 741, 78 Cal.Rptr. 373, 379, cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684, it was stated: " 'The due process clause requires "some definite link, some minimum connection, between a state

and the person, property or transaction it seeks to tax." (Miller Bros. Co. v. Maryland (1954) 347 U.S. 340, 344-345 [74 S.Ct. 535, 98 L.Ed. 747] • • •) The state's action will satisfy the constitutional test "if by the practical operation of a tax the state has exerted its power *in relation* to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." (Wisconsin v. J. C. Penney Co. (1940) 311 U.S. 435, 444 [61 S.Ct. 246, 85 L.Ed. 267] • • •)' [Citations.]" [Emphasis added.] That court further wrote, "The protection afforded and the benefits conferred must have some relationship to the transaction which the state seeks to burden." (Montgomery Ward & Co. v. State Bd. of Equalization, *supra,* at p. 745, 78 Cal.Rptr. at p. 382.)

[3] In the instant case it is true that the Society had in-state activities. However, these activities were so "dissociated" from the out-of-state sales that there is not sufficient nexus between the state and the Society to form a constitutional basis upon which the Society may be required to collect use taxes on the out-of-state sales.

What did the State of California give, in relation to the out-of-state sales, that the state can ask a return by way of requiring the Society to collect the use taxes? The answer is that the state provided no protections or benefits which were related to the out-of-state sales. Many California residents received the Magazine through the federal mail.[3] The Society advertised offerings of the books, maps, globes and atlases in question in the Magazine. The Magazine subscribers were also solicited to purchase these items by circulars received through the mail. After reading about the items in the Magazine ads or circulars, those California residents who chose to do so then ordered the items by mail from an office of the Society in Washington, D. C.

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[3] As of June 1972 there were 893,000 California subscribers to the Magazine.

Deliveries were made through the mail from either the Washington, D. C. or Maryland Society office. As can be seen, all parts of the transactions were conducted through the federal mail, with the state playing no part and providing no benefits or protections.

However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society maintained two small offices in California. A function of the secretary and salesman in each office was to solicit local businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars.

The fact that at one time the same type of products were sold in a relatively small amount to individuals over the counter in the two California offices presents no problem as that situation no longer exists. The only place where a California resident could have seen the items advertised was in the Magazine or in mailed circulars indicating that the items could be mail ordered.

The Board asserts that the Society's in-state activities are integrally related to the out-of-state sales in that the advertising which the Society's resident employees solicited for the Magazine created revenue for the Magazine, and the Magazine, in turn, was the basic vehicle used to promote the Society's mail order items and also provided the source of the circulars' mailing list. As discussed above, the connection is too tenuous to provide a constitutional nexus.

There appear to be no opinions presenting factual situations close to that of the case at bench. However, both appellant and respondent rely strongly upon a few cases

containing what they consider to be facts analogous to the instant case. The Board relies upon Nelson v. Sears, Roebuck & Co. (1941) 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888; Reader's Digest Association v. Mahin (1970), 44 Ill.2d 354, 255 N.E.2d 458, cert. den. 399 U.S. 919, 90 S.Ct. 2237, 26 L.Ed.2d 786; and Standard Pressed Steel Co. v. Washington Dept. of Rev. (1975) 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719.

Nelson v. Sears, Roebuck & Co., *supra,* 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888 considered whether an Iowa use tax was constitutionally applied to Sears' mail order business conducted directly between customers in Iowa and Sears' mail order houses located outside of Iowa. Sears was a New York corporation authorized to do business in Iowa, and having 12 retail stores in Iowa. The Supreme Court held that the use tax was constitutionally applied, on the theory that Sears was doing business in Iowa through its retail stores and thereby receiving benefits from the state for which the state had the power to exact a price; and that the mail orders were "not unrelated" to Sears' course of business in Iowa. The court wrote, as to the privilege of doing business in the state: "Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. Wisconsin v. J. C. Penney Co., *supra.* Respondent cannot avoid that burden though its business is departmentalized. *Whatever may be the inspiration for these mail orders, however they may be filed, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them.* Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." (Nelson v. Sears, Roebuck & Co., *supra,* at p. 364, 61 S.Ct. at p. 588.) [Emphasis added.]

The *Sears* case is distinguishable from the case at bench because Sears had extensive in-state activities due to its 12 retail stores in the state, and that local business was related to the out-of-state sales. The 12 Iowa stores no doubt served as advertisement and inducement for local residents to purchase mail order items, which probably were the same or similar to merchandise found in the stores. Both the retail and the mail order operations were related to the same overall sales effort. In the case at bench there is no such relation between the selling of advertising space in the Magazine and the mail order purchase of books, globes, maps and atlases. Additionally, the benefits and protections afforded the 12 in-state retail stores in the *Sears* case must have been extensive. This is not so in the instant case.

Reader's Digest Association v. Mahin, *supra,* 255 N.E. 2d 458 considered whether Illinois could hold Reader's Digest Association liable for collection of use taxes on the mail order purchase of books and phonograph albums by state residents during three months of 1967. The association was not licensed to do business in Illinois and had no office, sales house, warehouse or property in Illinois. It published a monthly magazine which was exempt from Illinois use tax, and also published books and record albums. The books and record albums could not be purchased in Illinois, but were ordered by mail from New York and shipped by mail to the purchaser. The evidence showed that during 1967 Reader's Digest Association solicited orders for the books and records by direct mail solicitation and by newspaper, radio, magazine and TV ads. The purely local advertising consisted of an ad in the Chicago Sun Times, and 305 radio and TV ads over Illinois stations.

Additionally, Reader's Digest Association wholly owned two subsidiaries in Illinois: Reader's Digest Sales and Services, Inc., and Reader's Digest Services, Inc., and held a 51% interest in Quality School Plan, Inc.

Reader's Digest Sales and Services, Inc. was licensed to do business in Illinois and had a Chicago office. The corporation solicited ads to appear in Reader's Digest magazine. Prior to the time period under consideration, the corporation had engaged in the door-to-door sale of records and record players.

Reader's Digest Services, Inc. was not licensed to do business in Illinois, owned no property in Illinois, and had one salesman residing in Illinois. The corporation published education material and a monthly Educational Edition of Reader's Digest.

Quality School Plan, Inc., in which Reader's Digest Association held a 51% interest, was not licensed to do business in Illinois and owned no property there, but had nine salesmen in the state who solicited orders for the Educational Edition of Reader's Digest.

The court there held, "Considering the full benefits flowing to plaintiff's aggregate business from its resident solicitors and local advertising, we find without further examination of the other subsidiaries an adequate basis for use-tax liability." (Reader's Digest Association v. Mahin, *supra,* 255 N.E.2d 458 at p. 460.) In this holding a full reading of the case reveals that the court is referring to the Reader's Digest Sales and Services, Inc. solicitation of ads to appear in the magazine when it refers to "resident solicitors," and that the court is referring to the advertising in the Chicago Sun Times and on local radio and TV stations when it refers to "local advertising."

A comparison of the holding in the *Reader's Digest* case to the facts in the case at bench shows that while the Society similarly has resident employees soliciting ads to appear in the Magazine, there is no local advertising of the Society's products in local newspapers, or on local radio and TV stations as there was in the *Reader's Digest* case. Further, if one goes behind the holding in that case

and considers all the facts presented, it is even more clear that the contacts between the state and Reader's Digest were far greater than the contacts in the case at bench.

In Standard Pressed Steel Co. v. Washington Dept. of Rev., *supra*, 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719, the appellant manufacturer with a home office and manufacturing plant in Pennsylvania and another plant in California appealed from a judgment upholding the imposition of Washington state's business and occupation tax levied on gross receipts of appellant resulting from its sale of aerospace fasteners to Boeing, its principal Washington customer. The appellant had one employee based in Washington, an engineer, whose office was in his home but who took no fastener orders from Boeing, but did consult with Boeing regarding its anticipated fastener needs and followed up any difficulties in the use of fasteners after delivery. The state taxing authorities found that appellant's business activities in Washington were sufficient to sustain the tax. The decision was affirmed on the appeal. The case is cited by defendant Board as applicable in the instant action. However, there is no comparison between Standard's connection with Washington and the Society's connection with California. The following quotation from the case shows this clearly. "The State Board of Tax Appeals found that the activities of Martinson [the appellant's engineer] were necessary to appellant in making it aware of which products Boeing might use, in obtaining the engineering design of those products, in securing the testing of sample products to qualify them for sale to Boeing, in resolving problems of their use after receipt by Boeing, in obtaining and retaining good will and rapport with Boeing personnel, and in keeping the invoicing personnel of appellant up to date on Boeing's lists of purchasing specialists or control buyers. . . . [¶] . . . appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing." (Standard Pressed Steel Co. v. Washington Dept. of Rev., *supra*, at 561, 95 S.Ct. at p. 708.) Very definitely, Standard's agent Martinson was directly connected with the sale of its product to Boeing. In our case the Society's agents in California had no connection with the sale of its products. They did nothing to make Californians aware of the Society's products and had nothing to do with solving problems if any arose in connection with those products. Standard Pressed Steel is not in point.

Respondent, Society, relies upon American Oil Co. v. Neill, *supra*, 380 U.S. 451, 85 S.Ct. 1130, 14 L.Ed.2d 1; and Montgomery Ward & Co. v. State Bd. of Equalization, *supra*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373, cert. den. 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684.

The *American Oil Co.* case considered the issue of whether, where a licensed Idaho dealer in motor fuels sells and transfers gasoline outside the state for importation into the state by an agency of the federal government, the state may constitutionally impose an excise tax upon the transaction on the theory that the dealer constructively receives the gasoline in Idaho upon its importation. Although the case dealt with an excise tax on the "dealer" who first "receives" the motor fuel in the state, not a use tax, the court applied the "nexus" test and held that since every phase of the transaction occurred outside the state, neither the fact that the dealer was licensed in the state nor that it performed activities in the state sufficed to uphold the tax. The court held that imposition of an excise tax with respect to an out-of-state transaction entirely dissociated from any in-state activity violated the due process clause. The case is analogous to the Society's situation where there are also in-state activities which are dissociated from the out-of-state sales.

In Montgomery Ward & Co. v. State Bd. of Equalization, *supra*, 272 Cal.App.2d 728, 78 Cal.Rptr. 373, the court

considered whether Montgomery Ward should be held liable for the collection of use taxes on sales of goods delivered on credit at its Klamath Falls, Oregon and Reno, Nevada stores to customers who held charge accounts bearing California addresses.

Montgomery Ward was an Illinois corporation which conducted a nationwide retail sales business with retail stores in California and many other states. There were 21 Montgomery Ward stores and a regional office in California. Because the Reno and Klamath Falls stores were close to the California border, some California residents customarily shopped in those stores. Montgomery Ward carried on a continual advertising program throughout California, Oregon and Nevada by mail, TV, radio, newspapers and magazines, with the border stores in question engaging in local media advertising which impinged on the neighboring California counties.

The court found that the border stores did not receive such opportunities, protection or benefits from California that the state could burden Montgomery Ward's Nevada or Oregon businesses with the collection of use taxes on sales to California residents which were completed outside of the State of California without violating the due process clause.

As to the commerce clause, the court found that California had contributed nothing to the sales but the home residence of the purchaser and a future haven for the goods he purchased out of state. It concluded that the discriminatory imposition of a use tax collection liability unwarrantedly burdened the right of the out-of-state retailer to do business with residents of California.

While the *Montgomery Ward* case differs factually from the instant case, it does illustrate the principle that the taxable transaction must bear some relation to the in-state activities of a business in order for the state to constitutionally impose a use tax collection liability. In the

case at bench, such a relationship between the in-state activities and the out-of-state sales does not exist.

The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justifiable relationship between the two.

The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents.

Judgment affirmed.

TAYLOR, P. J., and ROUSE, J., *concur.*

APPENDIX C

Constitutional and Statutory Provisions Involved

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§ 6201-04, 6362, set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1, 1967, and to and including June 30, 1972, and at the rate 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state,

not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6362. *Newspapers and periodicals.* (a) There are exempted from the taxes imposed by this part, the gross

receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

APPENDIX D

SUPREME COURT OF THE STATE OF CALIFORNIA

No. S.F. 23295

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff and Respondent,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant and Petitioner.

Notice of Appeal

TO: THE CLERK OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that the National Geographic Society, Respondent in the above-entitled proceeding, is appealing the judgment entered by this Court on April 1, 1976 to the Supreme Court of the United States of America pursuant to Section 1257(2) of Title 28 of the United States Code. (28 U.S.C. § 1257(2)).

DATED: June 17, 1976

HANSON, O'BRIEN, BIRNEY and BUTLER
ARTHUR B. HANSON
BROAD, KHOURIE & SCHULZ
Professional Corporation

/s/ By: EUGENE C. CREW
Eugene C. Crew

Attorneys for the National Geographic Society

Supreme Court, U. S.
FILED
NOV 24 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Appellee*

On Appeal from the Supreme Court of California

Jurisdictional Statement filed June 25, 1976

Probable Jurisdiction Noted October 12, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1868

National Geographic Society, *Appellant*

v.

Board of Equalization of the State of California,
Appellee

On Appeal from the Supreme Court of California

APPENDIX

Civil No. 577928

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO**

National Geographic Society, *Plaintiff*

v.

Board of Equalizatiion of the State of California,
Defendant

Relevant Docket Entries

4-18-67	Filed Complaint
6-30-67	Filed Answer of Defendant
8-16-73	Filed Memorandum that Civil Case is at Issue

9-14-73 Filed Stipulation of Facts

11-20-73 Filed Memorandum that Civil Case is at Issue

2-7-74 Filed Plaintiff's Memorandum in Support of Request for Refund and Declaration of Non-Liability for Use Tax

3-15-74 Filed Defendant's Trial Brief

4-1-74 Filed Plaintiff's Reply Brief in Support of Request for Refund and Declaration of Non-Liability for Use Tax

4-11-74 Trial

5-14-74 Filed and entered judgment that plaintiff have judgment against the defendant in the sum of Three Thousand Eight Hundred Sixty-Four and 33/100 Dollars and declaring plaintiff not liable for taxes as asserted by defendant.

5-15-74 Filed and entered amended judgment that plaintiff have judgment against the defendant in the sum of Three Thousand Eight Hundred Sixty-Four and 33/100 Dollars.

7-17-74 Filed Notice of Appeal and Notice to Prepare Clerk's Transcript

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In The Court of Appeal
First Appellate District
State of California

Civil No. 35629

8-15-74 Filed Clerk's Transcript on Appeal

9-6-74 Filed Record on Appeal

10-3-74 Filed Appellant's Opening Brief

11-2-74 Filed Respondent's Brief

11-20-74 Filed Appellant's Closing Brief

3-26-75 Filed Opinion and Judgment affirming the judgment below

4-10-75 Filed Petition for Rehearing and for Modification of Opinion

4-18-75 Filed Answer in Opposition to Petition for Rehearing and for Modification of Opinion

4-25-75 Filed Order denying petition for rehearing

In the Supreme Court
of the State of California, In Bank

No. S.F. 23295

5-5-75 Filed Petition for Hearing

5-14-75 Filed Opposition to Petition for Hearing

6-4-75 Filed Order granting hearing

5-1-76 Filed Opinion and Judgment reversing and remanding to Court of Appeal

6-17-76 Filed Notice of Appeal to the Supreme Court of the United States

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

(TITLE OMITTED IN PRINTING)

Complaint

(FILED APRIL 18, 1967)

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is now, and at all times mentioned herein has been a nonprofit, educational and scientific institution incorporated in and resident of Washington, D.C.

II.

Defendant is now, and at all times mentioned herein has been the duly qualified agency of the State of California having the power and duties of administering the Sales and Use Tax Law. The Attorney General of California has an office in the City and County of San Francisco.

III.

This action is brought by plaintiff against defendant pursuant to the provisions of the Revenue and Taxation Code of California for the recovery of use taxes, with interest thereon, erroneously and illegally collected by defendant from plaintiff.

IV.

Plaintiff, on or about November 1, 1965, responding to demands by defendant and acting under duress of threatened legal action for enforcement of defendant's demands, filed sales and use tax returns, number SN-OH-01-901200, for the two calendar periods of April 1 - June 30, 1964 and July 1 - September 30, 1964, and under protest paid the sums as shown in said returns, respectively, of $1,354.69 and $1,153.20, totaling $2,507.89.

Further, acting under said duress, plaintiff on or about February 26, 1966 paid under protest to defendant the additional sum of $1,340.05 demanded by defendant as interest and penalties of $424.45 on said state use taxes allegedly due on the aforesaid returns, and local use taxes of $841.43 and interest of $74.17 allegedly due on the same transactions covered by said returns.

V.

On or about September 28, 1966 plaintiff duly filed a claim for refund of the aforesaid state and local use taxes, penalties and interest totaling $3,847.94, with interest as allowed by law, a copy of which claim is attached to this

complaint as Exhibit A and by this reference is made a part hereof as if set forth herein.

VI.

More than six months have elapsed since the filing of plaintiff's said claim, without defendant having mailed notice of action thereon.

VII.

Defendant, by "Notice of Determination Sales and Use Tax" dated September 7, 1966, has given notice of state and local use taxes allegedly due, with interest and penalties, totaling $178,332.87 for the period 9-11-57 to 6-30-66. A copy of said notice is attached hereto as Exhibit B and by this reference is incorporated herein as part hereof.

Plaintiff, by petition duly filed with defendant on or about October 1, 1966, petitioned for redetermination of said determination, but plaintiff has not received notice in any manner of action thereon by defendant.

VIII.

The transactions on which defendant assessed said state and local use taxes and made its said determination of which notice was given as set forth in foregoing paragraph VII, were shipments into California of articles sold at plaintiff's office in Washington, D.C. on orders received there directly from California resident members of National Geographic Society and not solicited, received by, or known to any representative of plaintiff in California.

Plaintiff states that it maintains two offices in California (one in San Francisco and one in the Los Angeles area) but avers that said offices are restricted to solicitation of advertising for plaintiff's scientific and educational journal, published monthly and exempt from California sales or use tax; that said advertising is entirely unrelated to the articles on which the defendant has assessed said state

and local use taxes; and said offices are wholly without authority to sell or offer any said articles for sale or to solicit or receive or transmit orders in any manner, except for advertising as aforesaid. Plaintiff does not have any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of plaintiff or any subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

WHEREFORE plaintiff prays judgment:

1. That defendant refund to plaintiff the sum of $3,847.94 with interest as allowed by law;

2. That plaintiff is not liable in any way for taxes, penalty or interest, or any part thereof, as asserted by defendant in the Notice of Determination, Sales and Use Tax, dated September 7, 1966, account number SN-OH-01-901200;

3. That plaintiff is not a retailer engaged in business in this state within the meaning of the Sales and Use Tax Law, and defendant is without jurisdiction to assess, levy or collect sales or use taxes or to require plaintiff to file returns with respect to articles sold outside California and delivered to members of National Geographic Society in this state on orders sent to plaintiff's office or offices outside California; and

4. For such other and further relief as is just and proper in the premises.

NATIONAL GEOGRAPHIC SOCIETY

By /s/ MELVIN M. PAYNE
Executive Vice President Plaintiff

/s/ BERNARD S. DOBELL
Attorney for Plaintiff

EXHIBIT A

September 27, 1966

State of California
Board of Equalization
1020 N Street
Sacramento, California

Account No. SN-OH-01-901200
Claim for Refund of Use Tax

Gentlemen:

National Geographic Society claims a refund in the amount of $3,847.94, with interest as allowed by law, representing use taxes erroneously and illegally imposed on it and collected by the State Board of Equalization, as follows:

	Quarter	Tax	Interest	Penalty	Total
State:	4/1-6/30/64	$1,354.69			
		)	$172.02	$252.43	$2,932.34
	7/1-9/30/64	1,153.20			
Local:					
	4/1-9/30/64	841.43	74.17		915.00
					$3,847.94

The foregoing use taxes were levied by the Board on sales made outside California, and liability was asserted against the National Geographic Society under the purported authority of Section 6206 of the California Sales and Use Tax Law. The Society filed returns for the periods indicated and paid the taxes under protest. (See letter dated October 27, 1965).

In claiming this refund the National Geographic Society contends it is not a "retailer engaged in business in this state" within said Section 6203. The Society is chartered in Washington, D.C., under the laws of the United States, as a nonprofit scientific and educational organization for increasing and diffusing geographic knowledge

and promoting research and exploration. It reports its described activities in a monthly Journal, which is exempt from tax under Section 6362 of said Law. Incidental to the publication of its Journal and to its said activities, it develops such materials as maps, atlases and globes which it makes available for purchase at its Washington, D.C. office by its members.

The Society has two offices in California solely for solicitation of advertising for the Journal.* There is no office or representative of the Society in the state for the purpose of delivering, selling or taking orders for any tangible personal property, except as part of advertising.

Against this background, reference is made to the portion of Section 6203 which the Board's administrative office has cited as pertinent:

"6203. Collection by retailer. • • •

" 'Retailer engaged in business in this state' as used in this and the preceding section means and includes any of the following:

"(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

"(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property."

---

* One office is in Beverly Hills, the other in San Francisco. Briefly in the period from July 1963 to June 1964 nominal sales of maps, etc. were made inadvertently. Returns have been made and sales taxes paid thereon.

Analysis of the quoted provisions reveals that the functions contemplated obviously relate to sales. In subdivision (a) the emphasis is on facilities for administration, distribution, storage and display of personal property for sale. In subdivision (b) the concern is with the representatives engaged in selling, soliciting sales or delivery of personal property.

Considering that the sole function of the California offices and representatives of the Society is to solicit advertising for the exempt periodical, it becomes apparent that activities attributable to the Society in this state are not within the intended coverage of Section 6203. There is no connection between its in-state activities and out-of-state sales. Accordingly, no jurisdictional nexus to support imposition of liability on the Society for California use taxes is present.

Further, if it is assumed for purposes of analysis that Section 6203 is intended to apply to the existing facts, imposition of use tax liability on the Society still must fail. In such case the attempt to include the Society by arbitrary definition, unsupported by jurisdictional facts, would be an invalid abuse of statutory authority.

There being no in-state activity connected with the out-of-state sales, the attempted imposition of use tax liability on the Society is erroneous, arbitrary and invalid. Either to collect from the Society or force it to assume the burden of collecting the tax without just compensation would work a deprivation of property without due process of law, and would impose an undue burden on interstate commerce, in violation of the United States Constitution, Amendment 14, Section 1, and Article 1, Section 8, Clause 3.

On the facts and Constitutional authority outlined above, the National Geographic Society submits it is not liable, directly or indirectly, for California use taxes, and claims refund of the sums paid, with interest as provided by law.

The Society further requests a hearing in connection with the processing of its claim.

Respectfully,

NATIONAL GEOGRAPHIC SOCIETY
By /s/ BERNARD DOBELL
Attorney of Record

BT-401-BC2 (1-63)

STATE OF CALIFORNIA

BOARD OF EQUALIZATION—Department of Business Taxes

COMBINED STATE AND LOCAL SALES AND USE TAX RETURN

Due on or Before .....

Period for April 1—June 30, 1964

Partial Period .....

Mail to:
State Board of Equalization
P.O. Box 1799
Sacramento 8, Calif.

☐ Type of Account

Business Code –

Area Code—5977

Account Number—SN-OH-01-901200

Name—National Geographic Society

Business Address—1145 17th Street, N.W.

City—Washington, D. C. 20036

Reporting Basis—

STATE SALES AND USE TAX

1. *Total Sales* (Mail order sales to Wash. D.C. from residents of California) (enter "none" if you made no sales)		$45,156.36
2. *Add*—Purchase price of tangible personal property purchased without sales or use tax and used for some purpose other than resale (enter "none" if you have nothing to report)		None
3. *Total* (Line 1 plus Line 2)		45,156.36
DEDUCT EXEMPT TRANSACTIONS		
4. Sales to other retailers for purposes of resale	$	
5. Sales of food products for human consumption		
6. Sales to the United States Government		
7. Sales of motor vehicle fuel taxable under MVF License Tax Law		
8. Cash discounts allowed on taxable sales		
9. Credits for taxable merchandise returned		
10. Sales in interstate or foreign commerce to out-of-state consumers ..		
11. Amount of reimbursement for sales tax *if* included in Line 1		
12. Other exempt transactions ..... (See instruction 12)		
13. *Total transactions exempt from State Sales and Use Tax* (Lines 4 through 12)	$	None
14. Amount on which *State* Sales and Use Tax applies (Line 3 minus Line 13)		45,156.36
15. *Amount of State Tax* (3% of Line 14)		$ 1,354.69

LOCAL SALES AND USE TAX

16. Amount on which State Tax applies (Enter amount from Line 14) .....$ _____
17. *Add*—Purchase price of goods not included in Line 2 on which only the 3% State Tax was paid and the goods were used in a county having the state-administered 1% local tax .. _____
18. *Total* (Line 16 plus Line 17) ..... _____

DEDUCT TRANSACTIONS EXEMPT FROM LOCAL TAX ONLY (See instruction 19—Attach schedule)

19. a. .....$ _____
    b. ..... _____
20. *Total Transactions Exempt from Local Sales and Use Tax* ..... _____
21. Amount on which *Local* Tax applies (Line 18 minus Line 20) ..... _____
22. *Amount of Local Tax* (1% of Line 21) .....$ _____

STATE AND LOCAL TAX PAYMENT

23. *Total State and Local Tax Due and Payable* (Line 15 plus Line 22) .....$ 1,354.69
24. Penalty of 10% plus interest at ½% per month or part of a month must be added unless payment is made on or before the due date shown above. Penalty Interest
25. *Total Amount Due and Payable* (Line 23 plus any late filing charges—Line 24) .....$ 1,354.69

I hereby certify that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct and complete return.

Signature of Taxpayer or Agent
Sign here
/s/ C. VERNON SANDERS
Title—Associate Secretary

Make check or money order payable to
State Board of Equalization

NATIONAL GEOGRAPHIC SOCIETY
Sixteenth and M Street, N.W.
Washington, D.C. 20036

No. 98938 Voucher No. 47209

State Board of Equalization
P.O. Box 1799
Sacramento 8, Calif.

The attached check is in settlement of items listed below.

If incorrect, please return this voucher with check.

Date—October 27, 1965 *Acct. No.*—2,235

Description—State Sales and Use Tax (mail order sales to Washington, D.C. from residents of California) for period April 1—June 30, 1964

Gross—1,354.69 *Deductions*—[0] *Balance*—1,354.69

* In the certified record before this Court, there appears below the above form a photocopy of a check from the National Geographic Society to the State Board of Equalization in the amount of $1,354.69, on which check it is indicated "Paid Under Protest."

BT-401-BC2 (1-63)

STATE OF CALIFORNIA

BOARD OF EQUALIZATION—Department of Business Taxes

COMBINED STATE AND LOCAL SALES AND USE TAX RETURN

Due on or Before .....
Period for July 1—Sept. 30, 1964

Partial Period . ...

Mail to:
State Board of Equalization
P.O. Box 1799
Sacramento 8, Calif.

☐ Type of Account

Business Code— Area Code—5977

Account Number—SN-OH-01-901200

Name—National Geographic Society
Business Address—1145 17th Street, N.W.
City—Washington, D. C. 20036

Reporting Basis—

STATE SALES AND USE TAX

1. *Total Sales* (Mail order sales to Wash. D.C. from residents of California) (enter "none" if you made no saes) $38,440.12
2. *Add*—Purchase price of tangible personal property purchased without sales or use tax and used for some purpose other than resale (enter "none" if you have nothing to report) None
3. *Total* (Line 1 plus Line 2) 38,440.12

DEDUCT EXEMPT TRANSACTIONS

4. Sales to other retailers for purposes of resale ..... $ _____
5. Sales of food products for human consumption ..... _____
6. Sales to the United States Government ..... _____
7. Sales of motor vehicle fuel taxable under MVF License Tax Law .... _____
8. Cash discounts allowed on taxable sales ..... _____

9. Credits for taxable merchandise returned ..... _____
10. Sales in interstate or foreign commerce to out-of-state consumers .. _____
11. Amount of reimbursement for sales tax *if* included in Line 1 ..... _____
12. Other exempt transactions ..... _____ (See instruction 12) ..... _____
13. *Total transactions exempt from State Sales and Use Tax* (Lines 4 through 12) ..... $ None
14. Amount on which *State* Sales and Use Tax applies (Line 3 minus Line 13) 38,440.12
15. *Amount of State Tax* (3% of Line 14) ..... $ 1,153.20

LOCAL SALES AND USE TAX

16. Amount on which State Tax applies (Enter amount from Line 14) ..... $ _____
17. *Add*—Purchase price of goods not included in Line 2 on which only the 3% State Tax was paid and the goods were used in a county having the state-administered 1% local tax .. _____
18. *Total* (Line 16 plus Line 17) ..... _____

DEDUCT TRANSACTIONS EXEMPT FROM LOCAL TAX ONLY (See instruction 19—Attach schedule)

19. a. ..... $ _____
    b. ..... _____
20. *Total Transactions Exempt from Local Sales and Use Tax* ..... $ _____
21. Amount on which *Local* Tax applies (Line 18 minus Line 20) .....
22. *Amount of Local Tax* (1% of Line 21) ..... $ _____

STATE AND LOCAL TAX PAYMENT

23. *Total State and Local Tax Due and Payable* (Line 15 plus Line 22) ..... $ 1,153.20

24. Penalty of 10% plus interest at ½% per month or part of a month must be added unless payment is made on or before the due date shown above. Penalty Interest
25. *Total Amount Due and Payable* (Line 23 plus any late filing charges—Line 24) ..... $ 1,153.20

I hereby certify that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct and complete return.

Signature of Taxpayer or Agent
Sign here
/s/ C. VERNON SANDERS
Title—Associate Secretary

Make check or money order payable to
State Board of Equalization

NATIONAL GEOGRAPHIC SOCIETY
Sixteenth and M Street, N.W.
Washington, D.C. 20036
No. 98939 Voucher No. 47210

State Board of Equalization
P.O. Box 1799
Sacramento 8, Calif.

The attached check is in settlement of items listed below.
If incorrect, please return this voucher with check.

Date—October 27, 1965 *Acct. No.*—2,235

Description—State Sales and Use Tax (mail order sales to Washington, D.C. from residents of California) for July 1—September 30, 1964

Gross—1,153.20 *Deductions*—[0] *Balance*—1,153.20

* In the certified record before this Court, there appears below the above form a photocopy of a check from the National Geographic Society to the State Board of Equalization in the amount of $1,153.20, on which check it is indicated "Paid Under Protest."

REMITTANCE ADVICE

National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

Account No. SN-OH-01-901200

Date—February 3, 1966

DEMAND FOR IMMEDIATE PAYMENT SALES AND USE TAX

Demand is hereby made for the immediate payment of the delinquent amounts due from you as shown below:

(Additional monthly interest $..... will accrue after .....)

		Amount		
Previous Delinquent Balance	*Tax*	*Interest*	*Penalty*	*Total*
4-1-64 to 6-30-64 (1)		102.83	137.11	239.94
7-1-64 to 9-30-64 (2)		69.19	115.32	184.51
AMOUNT DUE		172.02	252.43	424.45

These delinquency charges have accrued because the tax, due (1) 7-31-64 and (2) 10-31-64, was not paid until 10-27-65.

Other amounts billed: Form BT-432 dated 2-3-66 for $915.15.

The entire amount shown above is delinquent and should be paid immediately. Make remittance payable to State Board of Equalization, remit to nearest District Office, and enclose this copy.

REMITTANCE ADVICE

National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036

Account No. SN-OH-01-901200

Date—February 3, 1966

NOTICE OF DETERMINATION SALES AND USE TAX

You are hereby notified of an amount of tax, interest and penalty due from you as shown below:

(Additional monthly interest $4.21 will accrue after 2-28-66. Additional penalty $84.14 if not paid by 3-5-66)

		Amount			
Period	*Measure of Tax*	*Tax*	*Interest*	*Penalty*	*Total*
4-1-64 to 9-30-64	84,152.68	841.43	74.17		915.60

Local tax not paid with returns.

Make remittances payable to State Board of Equalization.

In order to insure proper credit to your account please return this copy with your remittance.

NATIONAL GEOGRAPHIC SOCIETY
Sixteenth and M Street, N.W.
Washington, D.C. 20036

No. 2962 Voucher No. 3847

State Board of Equalization
Department of Business Taxes, P.O. #1799
Sacramento, California 95808

The attached check is in settlement of items listed below.
If incorrect, please return this voucher with check.

Date—March 14, 1966 *Acct. No.*—2,235

Description—State Sales & Use Tax (Sales made within the State of California) Amount of Local Tax and interest—4-1-64 to 9-30-64—85,142.68

Gross—915.60 *Deductions*—[0]

Date—March 14, 1966 *Acct. No.*—2,235

Description—Delinquent balance accrued because the tax, due (1) 7-31-64 and (2) 10-31-64, was not paid until 10-27-65

Gross—424.45 *Deductions*—[0] *Balance*—1,340.05

• In the certified record before this Court, there appears below the above form a photocopy of a check from the National Geographic Society to the State Board of Equalization in the amount of $1,340.05.

October 27, 1965

State of California,
Board of Equalization,
1020 N Street,
Sacramento, California.

Re: Protest of Use Tax Payment

Gentlemen:

The National Geographic Society forwards herewith sales and use tax returns for the second quarter of 1964, with payment in the amount of $16.39 for sales made within the State of California.

Also enclosed are sales and use tax returns for sales made without the State of California during the second quarter of 1964 and the third quarter of 1964 with payments in the amounts of $1,354.69 and $1,253.20, respectively. These payments are made only in conformance with our agreement of April 22, 1965, and in no way indicate acquiescence.

The National Geographic Society believes the use taxes on sales without the State of California during the second and third quarters of 1964 are illegal and void for the reason that the State of California is without jurisdictional power to require National Geographic Society to collect use taxes on its sales of tangible personal property made in Washington, D. C., through the United States mails, to its members resident in California.

The National Geographic Society is a non-profit, educational and scientific institution incorporated in and resident of Washington, D. C. While two offices are maintained in the State of California, in Los Angeles and San Francisco, these offices during the periods in question were engaged solely in the solicitation of advertising for the "National Geographic Magazine," a wholly unrelated enterprise exempt from the use tax by Section 6362 of the California

Sales and Use Tax Law. Such offices cannot provide the State of California with the jurisdictional nexus required to compel the National Geographic Society to collect use taxes on sales made without the state in interstate commerce, and any liability imposed on National Geographic Society for failure to do so deprives the Society of its property without due process of law in violation of Article XIV, Section 1, of the Constitution of the United States.

Moreover, collection of such tax would constitute a considerable burden on the staff of the National Geographic Society, and any statute delegating the State's tax collection responsibilities without just compensation is a deprivation of property without due process of law, in violation of Article XIV, Section 1, of the Constitution of the United States, and is an undue burden upon interstate commerce, in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States.

For these and other reasons, the National Geographic Society should not be considered a "retailer engaged in business in this State" in accordance with Section 6203 of the California Sales and Use Tax Law.

Therefore, the National Geographic Society protests the payment of use taxes for sales made without the State of California during the second quarter of 1964 and the third quarter of 1964 in the amounts of $1,354.69 and $1,153.20, respectively.

Respectfully submitted,

NATIONAL GEOGRAPHIC SOCIETY
By /s/ MELVIN M. PAYNE
Executive Vice President.

EXHIBIT B

DISTRICT OFFICE COPY No. 2

National Geographic Society
1145 17th Street, North West
Washington, D.C. 20036

Account No. SN-OH-01-901200

Date—September 7, 1966

NOTICE OF DETERMINATION SALES AND USE TAX

You are hereby notified of an amount of tax, interest and penalty due from you as shown below:

(Additional monthly interest $680.60 will accrue after 9-30-66. Additional penalty $23,611.94 if not paid by 10-7-66)

Period	*Measure of Tax*	*Amount*			
		Tax	*Interest*	*Penalty*	*Total*
9-11-57 to 6-30-66					
State Tax	3,570,293	107,108.79	23,979.07	10,177.47	141,265.33
Local Tax	2,901,064	29,010.84	5,333.67	2,723.23	37,067.54
TOTAL		136,119.43	29,312.74	12,900.70	178,332.87

Penalty of 10% has been added because of failure to file returns for the periods 9-11-57 to 3-31-64 and 10-1-64 to 6-30-66.

cc: New York.

September 26, 1966

State of California,
Board of Equalization,
1020 N Street,
Sacramento, California 95808

Re: SN-OH-01-901200

Gentlemen:

Referring to your notice of determination dated September 7, 1966, National Geographic Society protests the assessment as erroneous and, pursuant to Section 6561 of the Sales and Use Tax Law, requests redetermination that the Society is not liable for the indicated tax, interest or penalty, or any part thereof.

The Society is a nonprofit institution located outside California and engaged in scientific and educational activities incidental to which it publishes a journal and provides related materials for its members only. It in *fact* is not a retailer engaged in business in California and is not subject to the Sales and Use Tax Law.

The attempt by arbitrary definition to bring the Society within the orbit of the law is essentially a "bootstrap" operation which Constitutionally is invalid as a deprivation of property without due process and as an undue burden on interstate commerce. (U. S. Constitution, Art. 1, Sec. 8, Clause 3; Amendment 14, Sec. 1).

The Society requests a hearing in connection with the redetermination, as provided in Section 6562 of said law.

Respectfully,

NATIONAL GEOGRAPHIC SOCIETY

/s/ MELVIN M. PAYNE

By: MELVIN M. PAYNE
Executive Vice President

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

Account SN-OH-01-901200

In the Matter of the Petition of
NATIONAL GEOGRAPHIC SOCIETY
1145 - 17th Street, N. W.
Washington, D. C.

for redetermination of liability determined under the Sales and Use Tax Law.

Reporter's Transcript of Hearing

Date: May 24, 1967

Place: 1020 N Street
Sacramento, California

Honorable Paul R. Leake, Honorable Richard Nevins, Honorable George R. Reilly and Honorable John W. Lynch present; Honorable Houston I. Flournoy absent.

HONORABLE PAUL R. LEAKE, Chairman and Member, Third Equalization District: You may proceed with the case.

MR. E. H. STETSON, Tax Counsel, Board of Equalization: Mr. Chairman, Members of the Board, this is the hearing on the petition for redetermination filed by the National Geographic Society, Washington, D. C. We are all familiar with the National Geographic Society, particularly with respect to its monthly National Geographic Magazine which has been a popular magazine for many, many years.

We are concerned here, not with the magazine because that is exempt from sales tax as a monthly periodical, what we are concerned with here are sales made by the National Geographic Society of various bulletins, maps, atlases, globes, and books, which do not qualify under the periodical exemption.

(Honorable George R. Reilly, Member, First Equalization District, joined the other Members in the hearing room at this time.)

The liability in question, total with interest and penalty, is $182,416.45. This goes back to 1957 because the Society did not file returns and therefore the 8-year limitation period is involved.

Now the liability was based on estimates because records were not made available to the auditor, although requests were made to examine the records. The taxpayer has however indicated, at least for purposes of this hearing, this determination, they accept the auditor's estimated figures of total sales.

I might mention at this time that not long ago—a matter of a week or two—this same National Geographic Society filed a refund action in superior court in San Francisco to recover taxes paid with returns for, I believe, two quarters, the second and third quarters of 1964. This action is pending; it's just been filed and has been of course referred to the Attorney General. The issues involved are the same, I believe; and for that reason a request was made for a postponement of this hearing. And I think that request is going to be made by the representatives of the National Geographic Society now.

The staff did not feel in a position to recommend it because the amount sued for is $3,847, which is nominal compared to the amount under this petition for redetermination of $182,416.45. The staff did not feel it could recommend postponement for that reason. However the Board may see it differently.

Now the issues here—the one basic issue is the obligation of the National Geographic Society to collect use tax with respect to these globes, books, maps, and other things that I described a few moments ago. The contention of the petitioner is that it is not engaged in business in this state

within the meaning of Section 6203 of the Sales and Use Tax Law and therefore is not under an obligation to collect the tax. However, the company did maintain during the period involved here two offices in California.

Now the employees at these locations we were told were engaged in soliciting advertising for the National Geographic Magazine, not soliciting sales of merchandise of the type in question here. However, we do have some information that occasionally orders for tangible personal property were solicited by them. In any event, we feel that the maintaining of a place of business here is enough and that it does not have to be maintained for the purpose of promoting these specific sales in question.

The language of the statute is that a retailer is engaged in business in this state if he is maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business. The staff believes that such a place of business was maintained here and that is in itself sufficient.

Now in *People* v. *West Publishing Co.*, 35 Cal. 2d 80, a somewhat similar situation arose with respect to a law book publishing company that maintained offices for purposes in addition to or other than the solicitation of mail order business. The court pointed out that the mail order business was part of the total activity in the state and that they were properly required to collect the use tax and relied to some extent upon the United States Supreme Court decision in *Sears Roebuck* and *Montgomery Ward* which held a mail order business was simply part of the totality of the overall operation and held liable to collect the use tax.

Now I don't think any discussion of this case would be complete without my mentioning the very recent decision that came down just a week ago Monday from the United

States Supreme Court in *National Bellas Hess* case. Now in that case we had a mail order house that had no place of business in the taxing state; all of its solicitations were by mail; all of its sales were by mail. Illinois nevertheless contended that it was required to collect the tax. The Supreme Court in the five—six-to-three decision held against the right of Illinois to collect the tax.

And no doubt it might be argued that that is in point here; but we see a decided difference. In the *National Bellas Hess* case, the Court drew what it called a sharp distinction between decisions upholding the tax, the requirements to collect the tax, and those going the other way holding—striking out the requirement to collect the tax. It referred to the sharp distinctions which these and other decisions have drawn between mail order houses like Sears, with retail outlets, solicitors, or property within a state, and those who do no more than communicate with customers in this state by mail or common carrier as part of a general interstate business.

We think that this case before you now falls on the other side of the sharp distinction, because here the Society does more than merely communicate with customers by mail order or common carrier. It has these places of business in this State. It did have them. It solicited sales. It made sales. It maintained a small stock in California. True, that may not have been directly related to the mail order business, but as we read the statute it is enough to fall within the terms of the statute. I don't think that this is within the restrictions of the *Bellas Hess* case.

Now, the three gentlemen are here representing National Geographic, Mr. Dobell, Attorney, and Mr. Hanson, I believe, and officers of the company. Mr. Bernal Dobell, the general counsel, and Mr. Sanders here——

MR. ARTHUR B. HANSON, General Counsel, National Geographic Society: I am; he is associate secretary.

MR. STETSON: Gentlemen, you may address the Board with respect to the postponement, or whichever way you wish.

MR. DOBELL: Mr. Chairman and Members of the Board, I am Bernal Dobell, the attorney of record in this matter. Mr. Arthur B. Hanson, general counsel of the National Geographic Society, is here and will make the presentation.

MR. HANSON: Mr. Chairman, gentlemen, it is a mixed pleasure to be with you. We find your sunshine is far better than what we have had back east recently, but, on the other hand, we don't like to contest with the State of California or anyone else a problem involving us; but that's life.

Our position on this is very simple, and we'll state to you factually what it is after I first say that we are a little puzzled as to why we should have a hearing here at all. We filed an action in Superior Court on April 18. This has been forwarded through the proper processes, the offices here, and we understand the Attorney General now has it and is preparing his answer.

And as Mr. Stetson said this morning—or this afternoon—exactly the questions involved here would be decided by the issues in that case, but the staff's problem was that we had paid two quarters and had not paid the $180,000 that they feel we should pay.

I would only point out, that's a two-edged sword. If we are right, and pay you $180,000, you pay us 6 percent interest when the court orders it returned to us. And reading the newspaper earlier, I was impressed that Governor Reagan feels the State is in need of more revenue. Secondly, if we don't pay you and we lose, the National Geographic Society isn't going to fade away. We recognize we will have to pay you interest plus penalty if we lose the case.

Therefore we renew our motion for a continuance at this time and state to the Board that if it does not desire to grant the continuance that we are prepared to discuss the case in toto; and we are prepared to put Mr. Sanders, who is an associate secretary of the Society, one of its senior officers, who in effect operates as the controller of the Society, on to discuss those factual matters which would be important. So if it would be proper for the Board at this time—I don't know how you would want to handle it—if you would like to consider our motion at this time before we go further, we are prepared to work it that way.

CHAIRMAN LEAKE: What is your pleasure on the motion, gentlemen?

HONORABLE RICHARD NEVINS, Vice Chairman and Member, Fourth Equalization District: Mr. Hanson, as I understand, the Attorney General doesn't like to have a situation where a small amount of tax swings the big tax. In other words, he feels it all ought to be in one bundle; and so for those reasons, I think we ought to deny the motion for a continuance and—or at least take it under consideration and hear the factual matter on the issues involved in the case here before us.

HONORABLE GEORGE R. REILLY, Member, First Equalization District: Is it true that the case that is pending would be the determining factor in the matter that is before us today?

MR. STETSON: I understand that it would. We don't question the fact that the same issues are present in this law suit.

Now, as I say, the only reason we hesitated at the staff level to recommend this postponement was because of the large amount involved here and because of the fact that it might take a year or two, I suppose, for the court decision involving $3,800 to become final. That would mean holding up $182,000 for a considerable length of time.

MR. WILLIAM T. DENNY, Assistant Executive Secretary, Business Taxes, Board of Equalization: With appeals, it could go on for years.

MR. REILLY: The publisher of the National Geographic Magazine is a well-known organization as such—or the material they publish. It has been around for a long time. Why is it we began to audit just recently? They have been doing business this way for years and years and years.

MR. STETSON: We started this audit some years ago. Mr. Kerrigan can fill you in. We were not allowed access to the records.

MR. HANSON: November of '63 was the first request made of us, and at that time we told Mr. Kerrigan's office, "We cannot believe we are subject to the tax; and then we found that during a period of August 2, 1963 to May 6, 1964, that these two advertising offices, one in California—one in San Francisco and one in Beverly Hills down in the Los Angeles area—had had a limited number of maps, globes and magazines in the offices there as an accommodation to the members who would look up the address in the phone book and come back and not want to wait two or three weeks to get something from Washington.

My point here, Mr. Reilly, is very simple. We have executed the appropriate waivers with the State since this question arose, in no way endeavoring to apply the statute of limitations, which we could have done back in '64 against some of these items. We have signed all the waivers they have asked us to sign. We are prepared to sign any other waivers, but we think it is a needless process to hold court hearings on the very subject which you would be considering here today. But we are prepared to go ahead factually if that be the Board's desire.

What would happen were the Board to make a determination against us is we would go through the same procedure. We would have to then hold up the court proceed-

ing to wait until our claim for refund had been acted upon by you gentlemen. And if you acted expeditiously on it and denied it, then we would consolidate in the court that particular amount with the one we here have. If there is some question of the Society not being able to pay, there would be some purpose perhaps in——

MR. REILLY: Is there any question that the State would be in jeopardy?

MR. STETSON: I don't think so; do you, Mr. Kerrigan?

MR. H. P. KERRIGAN, Out-of-State District Tax Administrator, Board of Equalization: No, I do not.

MR. HANSON: I might state, the Society's budget for this year is about $50 million.

MR. REILLY: I am inclined to go along with the petitioner on the basis—or the case based upon the statement of Mr. Stetson that to the best of your knowledge that the settling of the other case would determine the collectability of this tax, plus the interest they would have to pay. They realize that? They have been informed? If there was jeopardy, that is different.

MR. DENNY: I think the case could go on for years, probably into the United States Supreme Court. It might be many, many years.

MR. REILLY: If they want to pay 6 percent interest—that's a good company. They pay their bills. And 6 percent interest, that is investing the taxpayers' money rather wisely.

MR. DENNY: Mr. Hanson's not wanting to proceed, apparently 6 percent to them isn't too much.

MR. HANSON: We think 6 percent in a tax organization is important if we are paying the money. We don't believe we owe it, and we do not believe we owe it—and actually the two quarters we filed were done in accordance with my last visit to Sacramento a couple of years ago.

MR. NEVINS: Well, Mr. Chairman, all I know is I got involved in a situation just like this where the taxpayers owed a lot of money. I said, "Why don't you pay some tax and get a claim for refund in the courts?" And the Attorney General's Office blew up on that because they didn't want to have a bunch of petitions lying around the Board and then go out and decide a small amount of money in court in a legal issue. I don't think the Attorney General's office would object if you paid one month's tax if the issue was prospective, that would be different; but we are dealing with past tax.

MR. HANSON: You have made a statement and you say, "Where the tax is owed." We say the tax isn't owed. We paid one quarter where it had been clearly agreed that there were no sales made by these officers in California to anyone and another quarter where there had been some sales that amounted to the great sum of $600 or $700. It might be of interest to you to know in the entire period in question these officers made sales of less than 300 items, as best we can figure it, in a state whose population is something in excess of 19 million. This was not a sales activity.

MR. NEVINS: Mr. Hanson, it just happens that one of my activities on the Board has been focusing on taxation of multistate businesses, of which this is one. And the most restrictive legislation we have had to deal with is in Congress right now, HR 2158, and even under that which restricts the reach of our tax considerably even where the *Bellas Hess* case being decided against the tax we would be able to collect tax.

MR. HANSON: I don't read their hearings that way. I testified in them.

MR. NEVINS: The only way you could avoid it prospectively is if you took the two offices out of California—which is obviously what you would do. If you left them in

the State, under the Willis Bill as it is now wrotten, we could still assess the tax. As I understand the Bill, you would have a place of business.

MR. HANSON: Congressman Willis disagrees with you.

MR. NEVINS: His staff switched around. He doesn't have the same staff now. He's changed his mind on a lot of it. I am convinced we could collect the tax if we had two officers in the State.

Now there is no reason in the world for you to have offices in California. I am sure you would draw them out in order to avoid the tax.

MR. HANSON: There is some reason to have it for the activity which you have expressly by statute exempted. This is one of our points in this case. The periodical was exempt under 6362 of your Code and of your regulations here. And in addition to that, these advertising sales offices are solely a part of the magazine operation, and the *American Oil Company* case decided by the Supreme Court in the spring of 1965 flatly held that this is a disassociated type of activity and refused to tax the American Oil Company. It involved the State of Idaho at that time.

Although it involved excise tax, as opposed to use tax, the language of that case is significant and we state very clearly to the Board and will to the courts when the time comes that the combination of the *American Oil Company* case and the *Bellas Hess* case, and with the factual picture here—which is one you have not had decided anywhere before. And this is one of the problems; never before has someone come to you or to your taxing authority and raised the point that an exempt purpose in the State in this fashion where you have specifically exempted a purpose and the sole activity of that office in the State relates to the exempt purpose under your own statute—I don't think it has been raised before. We have found no area where it has—that you have no authority to impose a tax where

you have specifically exempted that activity and that activity is not engaged in sales activities of the type that you are attempting to collect on.

MR. STETSON: Well, I might add there——

MR. HANSON: We would be happy if the Board were convinced of that.

MR. STETSON: There has been no matter which has arisen as high as the Board level or the court level, but the staff in its everyday activity in answering hundreds of inquiries has consistently taken the position in this situation to require collection of the tax. Maybe some people have paid and on that basis, maybe some have not. We wrote in 1964 and that was simply a restatement of the previous views of our legal staff that under the plain language of 6203 this company maintained a place of business here—and it did admittedly. That's all the statute requires.

The statute may be unconstitutional. Until it is held unconstitutional, I don't think we can assume it is. We are not embarking on something brand new here. This is a continuation of our consistent views.

MR. REILLY: I was going to say, Mr. Stetson, it seems reasonably fair to me where the taxpayer is being assessed a tax and we have a determination here and the law provides penalties—the 6 percent interest in case the courts determine through litigation that the tax is due the State—there is a penalty involved. No one is in jeopardy. Presumably no one questions the company's financial standing. I think the other case should go forward. Taxpayers shouldn't be forced by this Board to pay tax where there is a legal question and they are willing to litigate it at high expense to themselves—this litigation is costly—and if they lose the litigation, they know then that there is a 6 percent interest charge which I would cite as a penalty.

By litigating, they will determine it for us and the State of California in future cases and all similar type cases.

They are not only rendering a service to the people of California—if they are forced to pay, they will pay plus interest. I see no reason to insist, where no one is questioning the economic stability or ability to pay—if the tax is not due, they should never have had to pay or be put to the costly litigation. And I think it is fair for them—their request is a fair request.

MR. STETSON: Maybe I should speak. For myself I am not objecting at all to continuation or postponing. I have only stated that the staff did not feel it was its province to recommend it under the circumstances. We are not opposing the motion to postpone.

MR. REILLY: Do you object to my suggestion that the Board Members in view of possible litigation—or knowing that when the tax is paid eventually 6 percent interest will be charged against them, or the State of California, if they go to court and they win the litigation and tax is not due—and you do not question, as you said a minute ago, the stability, financial stability of the company—do you object to my making a motion that this matter go over until the other case is determined if they want to ride along at 6 percent interest and take that chance? If they win, they win. If they lose the litigation, they will lose it.

MR. STETSON: I do not object.

MR. REILLY: But to force the taxpayer to pay this tax when there is litigation involved—or will be litigation involved—I think it is an unfair burden. And I think we are not being fair with the taxpayer involved. Whether they be out of state or in California, they are still part of the great government of the United States, and I think they are entitled to a reasonable request. And I so move, Mr. Chairman.

HONORABLE JOHN W. LYNCH, Member, Second Equalization District: Mr. Chairman, I think the Attorney General would be just as happy if we kept out of it. I agree with

Mr. Reilly that instead of us finding one way or the other—because the courts are going to make the final decision, and the final decision is going to rule whatever we do. I am inclined to second Mr. Reilly's motion that we postpone or take it under submission, whatever it would be.

MR. STETSON: May I make one comment, not in opposition but to clarify the point Mr. Nevins raised a while ago, and that was whether the Attorney General was happy with our keeping large amounts under consideration while a matter is being litigated involving much smaller amounts. I don't know how the Attorney General personally feels about it or his staff; I would point out this, there is a general State policy expressed in the section which prohibits writs of mandate, and so forth, to prevent or enjoin collection of the tax. Those provisions are drastic. You do not enjoin collection of a tax or try to get declaratory judgment that the tax is invalid. Those have been thrown out of court here in California. We had one case in which $100 was paid against some $7,000 or $8,000 liability and the suit was brought to recover. In the court's opinion on that suit it weighed whether it was proper for the person to sue for that $100 and if the Board denied the claim, which it did in that case, which was the only thing the taxpayer could do—but that action did not, should not, indeed could not, prevent the State from proceeding to collect the balance of the liability because that would in effect be violating State policy as expressed in the statute against injunctions, writs of mandate and other extraordinary process to prevent or enjoin the collection of a tax.

I am giving you that information, not because I want to use it as an argument against the motion, but I want you to be aware of that circumstance which has some relevance to this case.

MR. HANSON: I would point out, if I may, in that case as Mr. Stetson has just stated the Board had acted on the $100 request. Here some six months had passed after we

had filed our request, and under the statute, as you gentlemen know, if the Board doesn't act within a six months' period, then we might file in court within 30 days. This is what we did. So that the Board had not made a determination, in one sense; in another sense, they had already made a determination on the amounts we had paid and it amounted to I think several thousand dollars; wasn't it, Mr. Sanders?

MR. C. VERNON SANDERS, Associate Secretary, National Geographic Society: We paid $3,800.

MR. HANSON: Covering these two periods, so we have paid this in. There has been a six months' passage of time where the Board did not consider the matter, for whatever reason, In turn, we in timely fashion, as soon as the six months passed, filed a suit in court. So I think that the factual situation is quite different.

CHAIRMAN LEAKE: Ready for the question? No further comments? You have heard the motion; all in favor say aye.

MR. REILLY: Aye.

MR. LYNCH: Aye.

CHAIRMAN LEAKE: Aye.

MR. NEVINS: I would like to be recorded as a no.

MR. REILLY: For the record, I suggest you call the roll.

MR. NEVINS: No.

MR. LYNCH: Aye.

CHAIRMAN LEAKE: Aye.

MR. REILLY: Aye. (Mr. Flournoy absent).

MR. HANSON: Thanks very much, Mr. Chairman, gentlemen.

• • •

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

(TITLE OMITTED IN PRINTING)

Answer

(FILED JUNE 30, 1967)

Defendant, as an answer to the complaint on file herein, admits, denies and alleges as follows:

I

Defendant has no information or belief sufficient to enable it to answer the allegations contained in paragraph I and basing its denial thereon denies each and every allegation contained therein.

II

Defendant denies each and every allegation contained in paragraph III save and except defendant admits that this is an action for the recovery of use tax and interest paid by plaintiff to defendant.

III

Defendant denies each and every allegation contained in paragraph IV save and except defendant admits and alleges as follows:

That on or about October 27, 1965, plaintiff filed with defendant California sales and use tax returns for the second and third quarters of 1964 and submitted with said returns the sums of $1,354.69 and $1,153.29 respectively;

That the amounts paid with the returns were not correct in that they did not include local tax or delinquency charges which had accrued because of the late filing of the returns;

That on February 3, 1966, defendant issued a Notice of Determination for local tax of $841.13 plus interest of $74.17 for a total of $915.60;

That on February 3, 1966, the Board issued a Demand for Immediate Payment for interest of $172.02 and penalty of $252.43 for a total of $424.45 which had accrued by virtue of the late filing of the returns; and

That on February 28, 1966, the amounts set forth in said Notice of Determination and Demand for Immediate Payment were paid by plaintiff to defendant.

IV

Defendant denies each and every allegation contained in paragraph V save and except defendant admits that on September 28, 1966, plaintiff filed a Claim for Refund with defendant for the sum of $3,847.94.

V

Answering paragraph VII defendant admits that there is now pending before the State Board of Equalization a Petition for Redetermination of plaintiff's sales and use tax liability for the period of September 11, 1957, through June 30, 1966, but defendant denies that the correctness or legality of the Determination now pending before the State Board of Equalization may properly be considered in this action.

VI

Defendant has no information or belief sufficient to enable it to answer paragraph VIII, and, basing his denial thereon, denies each and every allegation contained therein save and except that defendant admits that plaintiff made retail sales of tangible personal property to residents of the State of California, and that plaintiff maintains offices in California and is doing business in this State.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant be awarded his costs of suit and such other and further relief as to this Court seems just and equitable.

Dated: June 27, 1967.

THOMAS C. LYNCH,
Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

/s/ RALPH J. COWING,
Deputy Attorney General

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

(TITLE OMITTED IN PRINTING)

Stipulation of Facts

(FILED SEPTEMBER 14, 1973)

IT IS HEREBY STIPPULATED by and between the parties hereto by their respective counsel that for the purpose of trial of the above entitled case the facts hereinafter stipulated are true and correct and may be treated by this court as facts proven in open court.

This stipulation shall be the sole and exclusive evidence before the court in the trial of this matter; however, the parties reserve the right to amend this stipulation of facts by further and additional stipulations.

It is agreed, however, that this stipulation shall not be construed as a concession by either party of the relevancy or materiality of any of the facts stipulated herein and the parties hereto expressly reserve the right to argue the relevancy or materiality of any of the facts stipulated herein to be true.

1. National Geographic Society (hereinafter "the Society") is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N. W., Washington, D. C.

2. The State Board of Equalization (hereinafter "the Board") is the agency of the State of California empowered and required to assess and collect liabilities arising under the Sales and Use Tax Law of California.

3. The Society is exempted as an organization from the payment of federal income taxes under Internal Revenue Code section 501(c)(3) as amended.

4. The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890 the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly National Geographic Magazine (hereinafter "the Magazine"), its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports.

5. The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent (5%) of total circulation.

6. Membership in the Society is open to all persons. The majority of such members joined the Society because they desired to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington area. Members presently pay $7.50 a year for membership in exchange for which they receive one year's subscription to the Magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indexes); however, they do have the opportunity to purchase items published by the Society from its offices in Washington, D. C.

7. Non-member subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to in paragraph 5 above) must pay $9.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

8. As of June, 1972, there were approximately 872,000 member subscriptions and 21,000 non-member subscriptions to the Magazine in California.

9. The National Geographic Magazine is exempted from the California Sales and Use Tax as a "Periodical" under California Sales and Use Tax Law § 6362.

10. The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D. C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D. C. offices.

11. Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

12. Since 1956 the Society has maintained two offices in California. One such office has been on the 10th floor of the 31 story Russ Building in San Francisco. Until 1965 the other was on the second floor of a two-story building at 8693 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and secretary.[1]

13. During the period from August 1, 1963 through May 6, 1964, maps, atlases, globes and books of the type de-

[1] In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two salesmen and two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970.

scribed in paragraph 9 above were sold to individuals over the counter from the San Francisco and Los Angeles offices of the Society totalling a sales' value as follows:

San Francisco	*Los Angeles*
$679.20	$2,161.85

14. In comparison with local sales as tabulated in the foregoing schedule, the shipment of maps, atlases, globes and books exclusive of the Magazine to California Society members and residents from orders received at the Washington, D. C. office during the same period totalled a sales' value of $452,470.00.

15. With regard to the sales of maps, atlases, globes and books from the San Francisco and Los Angeles offices of the Society as described in paragraph 13 above, the offices did not verify whether or not a prospective purchaser was a member of the Society and sales could have been made to individuals who were neither members nor subscribers.

16. The Society paid to the Board state and local *sales* taxes plus appropriate penalties and interest upon sales totaling $546.20 described in paragraph 13 above during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

17. At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising for the Magazine.

18. During the period from April 1, 1964 to September 30, 1964 the Society made sales of maps, atlases, globes and books to California residents from its Washington, D. C. offices in the manner described in paragraph 10 above in the sum of $83,596.48.

19. Based upon the sales described in paragraph 18 above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	Collection Liability With State and Local Use Tax Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	38,440.12	1,752.86
	$83,596.48	$3,838.76

20. Two typical issues of the Magazine are attached hereto. These issues exemplify the Magazine during the period in question and today. The offerings of maps, atlases, globes and books in these issues and the order forms which constitute a part of such offerings are typical of the advertised offerings described in paragraph 10 above.

21. The Society has exhausted its administrative remedies and has timely brought this action for refund of the payments described in paragraph 19 above.

22. It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that this action may be brought to trial at any time prior to August 1, 1974 and that the Board hereby waives the provisions of Code of Civil Procedure section 58 up to and including July 31, 1974.

DATED: September 14, 1973.

For the
NATIONAL GEOGRAPHIC SOCIETY

/s/ ARTHUR B. HANSON
/s/ BERNAL E. DOBELL

EVELLE J. YOUNGER,
Attorney General of the State of California

ERNEST P. GOODMAN,
Assistant Attorney General

/s/ PHILIP M. PLANT,
Deputy Attorney General

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

(TITLE OMITTED IN PRINTING)

Amended Judgment

(FILED MAY 15, 1974)

The above-entitled matter came on regularly for trial on April 11, 1974 at 10:00 a.m., plaintiff appearing by its attorneys, Arthur B. Hanson of Hanson, O'Brien, Birney, Stickle & Butler, and Eugene C. Crew of Broad, Khourie & Schulz, and defendant appearing by its attorney, Philip M. Plant, Deputy Attorney General. The parties tried this action before the Court, without a jury, and upon a stipulation of facts. Based thereon, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff have judgment against defendant as prayed;

2. That defendant refund to plaintiff the sum of $3,864.33, together with interest thereon as provided by law as follows: (a) at the rate of 6% on the sum of $2,524.28 from November 1, 1965 to the date of entry of judgment; (b) at the rate of 6% on the sum of $1,340.05 from February 28, 1966 to the date of entry of judgment; and (c) at the legal rate of 7% on the total amount of the judgment from the date of entry thereof.

Dated: May 14, 1974.

/s/ ROBERT J. DREWES
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

(TITLE OMITTED IN PRINTING)

Notice of Appeal

(FILED JULY 17, 1974)

NOTICE IS HEREBY GIVEN that the Board of Equalization of the State of California, defendant, hereby appeals to the Court of Appeal of the State of California, First Appellate District from the judgment entered on May 14, 1974 in Judgment Book Volume A468, page 23, as amended by the amended judgment entered on May 15, 1974 in Judgment Book Volume A468, page 28, and the whole of the said judgments.

DATED: July 17, 1974.

EVELLE J. YOUNGER
Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

/s/ PHILIP M. PLANT
Deputy Attorney General

Attorneys for Defendant

COURT OF APPEAL
FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff-Respondent*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant-Appellant

No. 35629

The opinion of the Court of Appeal of the State of California, First Appellate District, dated March 26, 1975, affirming the judgment of the trial court, is unofficially reported at 121 Cal. Rptr. 77 (1975), and is printed as Appendix B of the Jurisdictional Statement.

SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

NATIONAL GEOGRAPHIC SOCIETY, *Plaintiff-Respondent*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant-Appellant

No. S.F. 23295

The opinion of the Supreme Court of California, dated April 1, 1976, reversing the judgment of the Court of Appeal, is reported at 547 P.2d 458 and 128 Cal. Rptr. 682, and is printed as Appendix A of the Jurisdictional Statement.

SUPREME COURT OF THE UNITED STATES

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee

Order Noting Probable Jurisdiction
Filed October 12, 1976

In this case probable jurisdiction is noted. The Chief Justice took no part in the consideration of this matter.

Supreme Court, U. S.
FILED
AUG 25 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of California

Motion to Dismiss or Affirm

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal From the Supreme Court of California

Motion to Dismiss or Affirm

Appellee Board of Equalization of the State of California, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss the instant appeal or to affirm judgment of the Supreme Court of California.

There is no substantial federal question presented as a basis of jurisdiction inasmuch as the questions have been foreclosed by previous decisions of this Court. In this

regard, the decision of the Supreme Court of California correctly applies the principles set forth in the cases of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941), *Nat. Bellas Hess v. Dept. of Revenue*, 386 U.S. 753 (1967) and *Standard Steel Co. v. Washington Revenue Dept.*, 419 U.S. 560 (1975). The case of *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954), which appellant contends is contrary to the opinion of the Supreme Court of California herein, is distinguishable from and not inconsistent with the said opinion.

QUESTION PRESENTED

Appellant National Geographic Society (hereinafter "the Society") has not fairly stated the question presented herein and has engaged in the wholesale insertion of unnecessary, irrelevant and argumentative detail in the statement of the said question presented to such an extent that it has broken a simple straightforward question into four partial and therefore improper "questions". The question presented is the following: Whether the Society's activities in the State of Calfornia provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by the Society's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964.

STATEMENT

The statement of facts set forth in the Jurisdictional Statement is unacceptable to appellee Board of Equalization (hereinafter "the Board") because it states as fact matters outside the record before this Court, omits relevant facts and dwells upon other irrelevant facts.

At page 5 of the Jurisdictional Statement, the Society states as fact the following:

> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register."

There is nothing in the record before this Court to show that the Society is not registered to do business in California. Moreover, there is an ample record to *contradict* the further assertion that the Society does not engage in activities within the State of California which would require registration. Thus, as even the Society is forced to admit, it is a stipulated fact that the Society sold certain of its maps, atlases, globes and books over-the-counter in California for a nine month period. Jurisdictional Statement, page 7; Stip. Par. 13; CT 27 (11-17).[1] Under California Law (California Revenue and Taxation Code section 6066[2]) the Society has clearly engaged in business during this time.

The Society further deletes from the statement of facts certain relevant facts which will hereafter be set forth. In addition, the Society sets forth in detail certain facts pertaining to its non profit status which have no bearing upon the resolution of the instant controversy.[3]

---

1. References to "stip" embrace the stipulation of facts which is contained in the Clerk's Transcript on Appeal lodged with this Court. For convenience, a copy of this stipulation is attached hereto as "Appendix A". References to "CT" denote the page number of the Clerk's Transcript wherein the referenced matters can be found with the appropriate line number thereafter indicated in parenthesis.

2. At all times relevant hereto, Section 6066 provided in relevant part that "[e]very person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business".

3. The Society's character as a non profit, scientific and educational institution is not relevant to the resolution of the instant controversy. While the Society's character in this regard is de-

STATEMENT OF FACTS

The Society, a District of Columbia corporation, publishes a monthly magazine known as the National Geographic Magazine (hereinafter "the Magazine"). Stip. Pars. 1 and 4; CT 24(31)-25(2), 25(16-21). The Society also sells maps, atlases, globes and books. Stip. Par. 4; CT 25(19-21).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Stip. Par. 4; CT 25(13-21). The scientific and educational information it obtains is made available to its members and subscribers through the Magazine, its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports. *Id.*

At all times relevant hereto, the Society maintained two offices in California—one in San Francisco and the other in Beverly Hills. Stip. Par. 12; CT 27(5-9). These offices were originally staffed with one salesman and one secretary each, but both offices have since doubled their personnel.

scribed in paragraphs 1 and 3 of the Stipulation of Facts, these paragraphs were included in the stipulation only at the request of the Society and are subject to the express reservation of the right of either party to argue relevancy set forth in the preamble to the Stipulation of Facts. Stip. p. 1, 11. 28-30; CT 24 (28-30).

In defending this action for refund of the disputed use tax collection liability, the Board is by no means asserting that the Society's objectives are not commendable or worthwhile. The fact remains, however, that the Society's character as a non profit, scientific and educational organization does not entitle it to different tax treatment than would be accorded a private enterprise trying to turn a profit. Stated in another way the Society's character is here irrelevant because this case will stand as a precedent which will govern the Board's treatment of other out-of-state retailers similarly situated. Such other retailers need not possess the non profit character of the Society. On the contrary, they will, in the main, be comprised of profit making retailers eager to escape the requirement of collecting use taxes in order to gain a competitive pricing advantage over local retailers.

Stip. Par. 12 and Footnote 1; CT 27(9-10), 27(27-31). These offices functioned as bases from which the Society solicited advertising for the Magazine; however, during the period from August 1, 1963, through May 6, 1964, the Society also sold certain of its maps, atlases, globes and books over the counter from these offices to Californians. Stip. Par. 13; CT 27(11-14).

The Society's primary method of selling these maps, atlases, globes and books to California residents was through orders placed with its District of Columbia offices. Stip. Par. 10; 26(21-24). The Society advertised offerings of these items in the Magazine and by announcements mailed to all members and subscribers. Stip. Par. 10; CT 26(18-21). Forms or coupons were attached to these advertisements for use in placing orders with the Society. Stip. Par. 10; CT 26(21-24). These orders were mailed to the Society's District of Columbia offices and filled by postal deliveries of the merchandise to the purchaser from the Society's District of Columbia and Maryland offices. Stip. Par. 10; CT 26(21-27). Payment was either on a cash with order basis or a later billing basis. Stip. Par. 10; CT 26(27-29).

Although these advertisements were sent only to subscribers or members, anyone with access to the Magazine could remove the order coupon and purchase these articles from the Society. Stip. Par. 11; CT 27(1-4).

During the period from April 1, 1964, to September 30, 1964, the Society sold maps, atlases, globes and books from its District of Columbia offices to California residents in the aggregate sum of $83,596.48. Stip. Par. 17; CT 28(10-14). The Board assessed a use tax collection liability against the Society measured by these sales and the Society paid this assessment under protest in the sum of $3,838.76.

Stip. Par. 19; CT 28(20-27). The Society thereafter exhausted its administrative remedies and timely commenced this suit for refund of the sum described above as allowed by law. Stip. Par. 21; CT 29(3-5).

ARGUMENT

The Question Presented Herein, Having Been Resolved by Prior Decisions of this Court, is Neither Substantial Nor Important.

A. The Decision Below Is In Accord With the Decisions of This Court.

The California Supreme Court held below that the Society's activities in the State of California provided sufficient nexus to support the constitutional imposition of the use tax collection liability imposed upon it by the Board and measured by the Society's gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents. In so holding, the Court predicated its finding of sufficient nexus upon the fact that the Society's maintenance of two employee-staffed offices in this State from which it solicited advertising for the Magazine occasioned it to receive from California protection and benefits for which California could ask return and upon the further fact that these activities were not unrelated to the transaction taxed. It is shown below that this holding is in complete accord with the prior decision of this Court.

The Due Process Clause and the Commerce Clause are closely related insofar as similar standards have been applied by the Courts to determine whether state tax laws are constitutional thereunder. *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756 (1967). These

standards are incorporated into a test of nexus or minimum contact between the taxpayer and the taxing jurisdiction which is necessary to support a finding that the tax is constitutionally imposed. Although the test has been variously stated, the most workable definition of what constitutes nexus is set forth in *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940), wherein the Court noted:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Id.* at 444.

Applying this definition to the facts of this case, it can readily be seen that the Society has secured substantial benefit from its activities within California. By virtue of the protection conferred by this State, the Society has been able to establish and maintain employee staffed offices in San Francisco and Beverly Hills from which to solicit advertising revenues for the Magazine. In this regard it is noteworthy that the Society has since doubled its salesmen and secretaries in both California offices. Further, the very opportunity of having a market of potential advertisers in California from whom to solicit business is a benefit conferred by the state insofar as its laws protects them and permits their continued existence. The net result of these activities is obviously beneficial insofar as it provides the Society with advertising dollars from California businesses.

Certainly the above benefits justify requiring the Society to collect a use tax on its mail order sales to Californians. It is asking the Society no more than to bear a fair share

of the cost of local government. Indeed, in *Standard Steel Co. v. Wash. Revenue Dept., supra,* 419 U.S. 560 (1975), this Court declared that it "verges on the frivolous" to contend that a foreign retailer whose only connection with the taxing state exclusive of U.S. mail and common carrier was a consulting engineer who worked out of his home and discussed anticipated needs of customers had not received anything for which the taxing jurisdiction could ask return by imposing a business and occupation tax upon the retailer measured by the gross receipts of its mail order-common carrier sales. *Id.* at 562.

Having found the Society's activities in California sufficiently substantial to support a finding of nexus under the aforementioned principles, the California Supreme Court went on to conclude that the relational requirements established by this Court in *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941), were also met in the instant case. In that regard, the California Supreme Court held that the Society's sales of maps, atlases, globes and books from its District of Columbia and Maryland offices were not unrelated to its California solicitation of advertising for the Magazine insofar as they both constituted a part of the Society's business in California, both were remarkably similar in nature, function and purpose, and both fulfilled the Society's fundamental purpose of making the information it gathered available to the enhancement of geographic knowledge generally.[4]

4. The Society suggests in the Jurisdictional Statement that the California Supreme Court upheld the validity of the use tax collection liability imposed upon it without regard to whether or not its advertising soliciting activities had any connection whatsoever with the transaction taxed. Jurisdictional Statement at pages 12, 15. This suggestion ignores the Court's holding as described above. The Court clearly found the Society's in-state activities were not dissimilar from its mail order sales and that both were parts of the Society's overall California business and could not be said to be unrelated under the guise of departmentalization. In so holding the Court recognized that under the rule of the *Sears* case these activities must be shown not to be unrelated to the Society's overall course of business within this State.

Nelson v. Sears, Roebuck & Co., supra, 312 U.S. 359 (1941), supports the Court's ruling as above described. In that case, this Court upheld the imposition of an Iowa use tax collection liability upon mail order sales which were ordered and shipped by mail or common carrier between the Iowa purchaser and the retailer's out-of-state stores. The Court based its finding of taxable nexus upon the fact that the retailer had stores in Iowa from which it made over-the-counter sales and took orders for shipments of merchandise from out-of-state branches direct to the Iowa purchasers. The retailer argued that the sales made and orders placed through its Iowa retail outlets were separate and distinct from the mail order sales in dispute. In response to this argument, the Court observed:

> "Respondent [the retailer] cannot avoid that burden [the disputed use tax collection liability] though its business is departmentalized. Whatever may be the inspiration of these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." *Id.* at 364.

The rule of the *Sears* case applies in the instant case. Both cases involve the imposition of a use tax collection liability upon mail order sales which may rightly be assumed to be not unrelated to the retailer's other contacts

with the taxing jurisdiction in light of commonly understood facts of business life. In *Sears,* the existence of the retail outlets in Iowa could be said to contribute to some unknown extent to the generation of mail order sales. In the instant case, the Society's advertising offices provide revenus for the Magazine which serves as a vehicle through which the disputed mail order sales are generated and which lends its prestige to the mail order merchandise thereby enhancing their salability.

In addition to its compatibility with the *Sears* decision, the opinion of the California Supreme Court in the instant case is consistent with this Court's holding in *Nat. Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753 (1967). While this Court there held that a use tax collection liability could not be imposed upon an out-of-state retailer whose only contacts with the taxing jurisdiction were through the use of common carriers and the U.S. mail, it scrupulously restricted its decision in that regard to retailers who "do no more than communicate with customers in the State by mail or common carier as a part of general interstate business." *Id.* at 758. It thus suggests that any contacts with the taxing jurisdiction independent of the use of mails and common carriers could support the imposition of a use tax collection liability.

In light of the foregoing, it is respectfully submitted that the decision below is in full accord with the decisions of this Court.[5]

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5. While not a decision of this Court, the decision of *Reader's Digest Association v. Mahin,* 255 N.E.2d 458 (1970), with regard to which this Court denied review in 399 U.S. 919, also supports the decision below. In the *Reader's Digest* case, the Illinois Supreme Court upheld a use tax collection liability imposed by Illinois upon mail order sales of books and phonograph albums made during the fourth quarter of 1967. The retailer, Reader's Digest Association, published a monthly magazine (which was exempt from Illinois use tax) in addition to selling books and phonograph albums. During 1967, the retailer used Illinois advertising media to promote its sales of the books and phonograph albums. The retailer also owned two subsidiaries and held a majority interest in a third corporation all of which had certain contacts with Illinois. One of these subsidiaries, Reader's Digest Sales and Service, Inc., solicited advertising for the magazine although it also had made door-to-door sales of phonograph record players and albums for a time prior to August 1, 1967.

Two grounds were advanced below and reviewed on appeal in support of a finding a taxable nexus: (1) the retailer's local advertising supported a finding of nexus; (2) the activities of the retailer's subsidiaries supported a finding of nexus. The Court considered the first ground and concluded that "certain promotional benefits were derived throughout the year". 255 N.E.2d 458, 460. The Court then considered the second ground but restricted its analysis to the activities of Reader's Digest Sales and Services, Inc. With regard to these activities, it observed:

> "Through its *solicitors* in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents. Considering the full benefits flowing to plaintiff's aggregate business from its resident *solicitors* and local advertising, we find without further examination of the other subsidiaries an adequate basis for use-tax liability." 255 N.E.2d 458, 460. (Emphasis added.)

It is clear that the word "solicitors" underscored in the quote was intended to describe the employees of Reader's Digest Sales and Services, Inc., who solicited advertising for the magazine. Therefore, this opinion upholds the imposition of a use tax collection liability on two grounds, one of which was the activities of Reader's Digest Sales and Services, Inc., which for purposes of the Court's analysis were indistinguishable from the Society's activities in the instant case.

B. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy

The Society argues in the Jurisdictional Statement that the California Supreme Court improperly refused to apply the "dissociation" test set forth in *American Oil Co. v. Neill,* 380 U.S. 451 (1965) and *Norton Co. v. Department of Revenue,* 340 U.S. 534 (1951). In advancing this argument, the Society ignores the fact that the excise taxes before the

Court in those cases fell upon the foreign retailers whereas the use tax collection liability involved in the instant case falls upon the local California purchaser. This difference is crucial insofar as stricter standards of nexus are applied with regard to testing the validity of taxes falling on the foreign retailer.

It is settled under state law that the California use tax collection liability has its incidence upon the California purchasers who store, use or consume the products purchased from foreign retailers. See *Bank of America v. State Bd. of Equal.*, 209 Cal.App.2d 780, 793 (1962); 26 Cal.Rptr. 348. The foreign retailer is liable only for his default in the performance of his duty as collection agent of this tax under California Revenue and Taxation Code section 6203. *Id.* at 799.

The significance of the distinction between a use tax collection liability, the incidence of which is on the local purchaser, and an excise tax imposed directly upon the out-of-state retailer itself was recognized by this Court in *Norton Co. v. Dept. of Revenue, supra,* 340 U.S. 534 (1951), where, in passing upon the constitutionality of a gross receipts tax imposed upon a nonresident retailer, it declared inapposite cases involving the collection of taxes attributable to the local buyer observing that a state imposing use taxes can more easily meet the burden of demonstrating sufficient nexus to support the tax because the impact of those taxes is on the local buyer or user. In that regard, the Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.,* 322 U.S. 327. Of course, a state imposing a sales[6] or use tax *can more easily meet this burden,* because the impact of those taxes is on the local buyer or user. *Cases involving them are not controlling here, for this tax falls on the vendor.*" (Emphasis added.) 340 U.S. at 537.

This distinction is justified because the local buyer or user has more obvious contracts with the taxing jurisdiction than the nonresident retailer and therefore a tax whose incidence falls upon such buyers or users is more easily sustainable. This is a difference in substance and not merely form. In *McLeod v. Dilworth Co.,* 322 U.S. 327 (1944), the Court noted:

> ". . . we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution, neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' *Wagner v. City of Covington,* 251 U.S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331.

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6. The reference to a "sales" tax at this point is explained by the fact that some states have sales taxes the incidence of which falls upon the *consumer* rather than the vendor. See State and Local Taxation, John F. Due (1971), pp. 24-26. Illinois (at the time of the *Norton* decision) had a sales tax the incidence of which was on the vendor and therefore the court was holding inapplicable decisions involving consumer type sales taxes and use tax collection liabilities such as are present in this case.

Perhaps the best illustration of the effect of this distinction is a comparison of the *McLeod* case and *General Trading Co. v. Tax Comm'n,* 322 U.S. 335 (1944). These two cases were argued and decided on the same dates and presented virtually identical facts save and except that *McLeod* involved a sales tax upon an out-of-state retailer and *General Trading Co.* involved a use tax collection liability imposed upon an out-of-state retailer. In both cases the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by traveling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection liability was upheld. The dissents in both cases indicate that the majority reached different results in the two cases solely because of the nature of the tax imposed.

Similarly, *McLeod* also can be contrasted with *Scripto* v. *Carson,* 362 U.S. 207 (1960), where on comparable facts, the court upheld the constitutionality of a use tax collection liability imposed upon the nonresident retailer. The facts of these two cases were recognized as indistinguishable in 81 Harv.L.Rev. 69, 216.

Just as the *Norton* case has been shown to be inapplicable to the instant controversy, so is the case of *American Oil Co. v. Neill, supra,* 380 U.S. 451. In that case, an Idaho State Tax Collector imposed an excise tax on an out-of-state motor fuel dealer. *Id.* at 454, 455. The court expressly adopted the findings of the trial judge that the incidence of the tax was on the dealer not the local user. *Id.* at 456-457.

C. The Decision of This Court in Miller Bros. v. Maryland, 347 U.S. 340 (1954) Is Inapplicable to the Resolution of the Instant Controversy

The mainstay of the Society's attack upon the decision below is that it is "flatly contrary to the holding of this Court in *Miller Bros. Co. v. Maryland,* 347 U.S. 340 (1954)" Jurisdictional Statement, page 1. As is shown below, the *Miller Bros.* case is not germane to the question here presented because the Court's finding of insufficient nexus in that case turned upon defects not present in the instant case.

In *Miller Bros. v. Maryland,* the court invalidated a Maryland use tax collection liability imposed with regard to the sales of merchandise by a Delaware corporation from its Delaware store to visiting Maryland customers. The merchandise purchased from the Delaware store was either handed to the customer over-the-counter or delivered to the customer's Maryland address by common carrier or the vendor's vehicle. The court in holding the Maryland use tax collection requirement unconstitutional, noted that it was uncertain as to whether merchandise sold over-the-counter was actually transported to Maryland prior to use. 347 U.S. 340, 344.

It is clear from the above that the Court's holding in Miller Bros. turned upon a defect in the relationship between the foreign retailer and the transaction taxed which is not present in the instant case. This defect was aptly described by the court below as follows:

> "The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto v. Carson, supra,* 362 U.S. 207. 212[4 L.Ed.

> 2d 660, 664-665], the Supreme Court declared that it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection to uphold a tax against attack under the due process clause. (*American Oil Co. v. Neill, supra,* 380 U.S. 451, 457 [14L.Ed.2d 1, 6].)" 16 Cal.3d 637, 649-650

In direct contrast, the Society in the instant case shipped all purchases directly to its California customers inside California; hence no uncertainty or gaps intervene between the Society's activities and the taxable transaction.

In addition to the foregoing, *Miller Bros.* may be distinguished from the instant case insofar as the foreign retailer in that case did not directly exploit the market of the taxing State. Thus, the Court in *Miller Bros.* emphasized that the Delaware based foreign retailer did not engage in solicitation in Maryland, the taxing jurisdiction, "other than the incidental effects of general advertising" in Delaware and that there had been "no invasion or exploitation of the consumer market in Maryland", thereby recognizing the *incidental* nature of the solicitation of the Marylanders there involved. 347 U.S. 340, 347. Stated in another way, the Delaware store did not direct an advertising campaign specifically against the residents of Maryland; rather, its general advertising directed to potential customers in the vicinity of the store spilled over into Maryland as well as reaching residents of Delaware. Further, the purchasers did not deal with the store from their residences but had to leave Maryland and visit the store in Delaware. This situation prompted the United States Supreme Court in *Scripto*

v. Carson, supra, 362 U.S. 207 (1960), to characterize the facts of *Miller Bros.* as follows:

> "True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but *Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.*" (Emphasis added.) 362 U.S. 207, 212.

All of the above described factors which led the court in *Miller Bros.* to find that there had been no exploitation of the Maryland market are absent in the instant case. The Society specifically directed its advertising campaign for the sales of maps, atlases, globes and books against its California subscribers. This solicitation was continuous in the form of repeated advertisements in the Magazine and mailed announcements sent throughout all periods relevant hereto. Finally, the Society did not wait for these California residents to come to its out-of-state stores, but enclosed with the advertisements mail order coupons which were completed and sent directly to respondent. It is clear that under the rationale of the *Miller Bros.* case the Society has exploited the California market.

For all the foregoing reasons, the *Miller Bros.* case is inapposite.[7]

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7. The case of *Montgomery Ward & Co. v. Bd. of Equalization,* 272 Cal.App.2d 728 (1969), cert. den. 396 U.S. 1040, cited by Society can be distinguished on the same grounds as *Miller Bros.* insofar as it involved a California use tax collection liability imposed with regard to over-the-counter sales of goods by an out-of-state retailer from its Reno, Nevada and Klamath Falls, Oregon stores to customers with California addresses. As the California Supreme Court below noted, the constitutional defect in the *Montgomery Ward* case "lay in the lack of certainty between the seller's activities and the event to be taxed, namely the use". 16 Cal.3d 637, 649.

D. The Remaining Contentions of Appellant Are Without Merit

Although it has been shown in the preceding sections of this brief that the Society's basic contentions are without merit, certain points raised by the Society in its Jurisdictional Statement have not previously been touched upon and will be dealt with below.

The Society argues that the instant case is distinguishable from all prior decisions of this Court which held sufficient nexus existed to warrant the imposition of a use tax collection liability upon a foreign retailer because the "indispensible element" of a local sales activity is missing herein. Jurisdictional Statement, page 14. This conclusion is totally at variance with the rationale underlying the decisions of this Court. As noted earlier, the question of whether sufficient nexus exists turns upon the question of whether the taxing State has given anything for which it can ask return. *Wisconsin v. J. C. Penney Co., supra,* 311 U.S. 435, 444 (1940). Obviously, a foreign retailer can enjoy the benefit of the protection of the local government of the taxing jurisdiction in the conduct of activities other than sales activities. It would contradict the logic of the fairness concept underlying the nexus requirements above described to say that, while sales related local activities would be recognized as drawing upon the protection of local government, all other activities would not. Yet that is what the Society is asking this Court to do. It is submitted that it would be folly to entertain the fiction that the Society, which has two employee staffed offices in California, does not enjoy benefits for which a return can be asked.

In addition to the logical inconsistency of the Society's position, it is evident that such a limitation upon the character of a foreign retailer's local activities supporting a finding of nexus would conflict with the decisions of this Court. Thus, in *National Bellas Hess v. Department of*

Revenue, supra, 386 U.S. 753 (1967), in holding that a use tax collection liability could not be imposed upon an out-of-state mail order retailer whose only contacts with the taxing jurisdiction were through the use of common carriers or the U.S. mail, this Court noted that to conclude otherwise would be to:

> "... repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or *property within a State,* and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." (Emphasis added.) 386 U.S. 753, 758.

It is evident from the above that the Court recognized that a mail order seller with property within a state would subject itself to taxation upon its mail order sales to the residents of that state even though ownership of property does not equate to the sales activities which the Society suggests constitute an "indispensable element" of nexus.

The Society attemps to distinguish the holding of this Court in *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1941) upon the ground that the foreign retailer in that case was qualified to do business within the taxing jurisdiction. Jurisdictional Statement, page 18. In that regard, as noted earlier, the Society has gone outside the record before this Court to suggest that it was not similarly qualified to do business in California. This suggestion conflicts with the record insofar it is stipulated that the Society did sell tangible personal property in California during the first nine months of the period in controversy and therefore, pursuant to the presumption that things are

8. *McFarland v. Campbell,* 213 F.2d 855, 858 (1954).

lawfully done,[8] it must be presumed that the Society complied with California Revenue and Taxation Code Section 6066 and secured a seller's permit. Moreover, even if it were assumed that the Society did not seek a seller's permit, it should nevertheless be estopped to deny the lack of having qualified to do business in California in light of its stipulated admission that it did in fact do business in this state.

Furthermore, the result reached in *Sears* would not have been otherwise if the retailer in that case had not been registered to do business within that state. Although the Court there speculated hypothetically that the lack of qualification to do business within the taxing jurisdiction might result in an inability to tax occasioned by the impotence of state power, it went on to find that the taxpayer's local activities in the taxing jurisdiction were "not unrelated" to its mail order business. 312 U.S. 359, 364. Thus the court recognized that the presence or absence of qualification to do business within the taxing jurisdiction was superfluous to the conclusion it reached on the facts before it. Moreover, this Court has easily found sufficient nexus to support the imposition of a use tax collection liability against foreign corporations in other cases before it despite the fact that the corporation was not licensed to do business in the taxing state. *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U.S. 62 (1939); *General Trading Co. v. Tax Comm'n.,* 322 U.S. 335 (1944). It follows that the Society's arguments in this regard should be dismissed as irrelevant.

The Society alludes to the fact that the Magazine is exempt from tax. Jurisdictional Statement, pages 15, 18. This exemption is conferred as a matter of legislative grace under California Revenue and Taxation Code 6362 which exempts the gross receipts from the sale or use of periodicals and their components from sales and use taxation and

is not germane to the resolution of the instant controversy.[9] Nevertheless, the Society makes reference to this statute thereby suggesting that it somehow compels this Court to disregard its California advertising soliciting activities in passing upon the question of whether sufficient nexus exists to support the disputed use tax collection liability. This suggestion is spurious.

In the first place, the periodical exemption contained in section 6362 does not relate to the Society's California advertising soliciting activities. The statute only addresses itself to the taxability of gross receipts from the sale or use of *tangible personal property.* This is eminently logical because sales and use taxes are only imposed with regard to the gross receipts from the sale of tangible personal property or the sales price of tangible personal property stored, used or otherwise consumed in California. California Revenue and Taxation Code Sections 6051, 6201. Thus, unless there is a sale or use of *tangible personal property,* the event is nontaxable under the Sales and Use Tax Law. Section 6362, which confers an exemption from sales and use taxes, must therefore necessarily refer exclusively to gross receipts from transactions in *tangible personal property.* To hold otherwise would be to construe this statute as exempting from sales and use taxation transactions which are not subject to sales and use tax in the first place. In contrast, the Society's solicitation of advertising and subsequent sale of advertising space is a *service* as opposed

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9. California Revenue and Taxation Code Section 6362 provides in relevant part as follows:

"(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical."

to a transaction in tangible personal property. Therefore, section 6362 does not apply.

In the second place, even if the Society's California advertising soliciting activities were declared by some hypothetical statute to be exempt from state taxation, this would be irrelevant to the instant controversy. Such a statute would not affect the determination of whether the Society had received any benefits from its California advertising activities for which California can ask a return under federal constitutional standards of nexus. The California Supreme Court noted this when it observed:

> "The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power." 16 Cal.3d 637, 645.

This point was also made in *Reader's Digest Association v. Mahin, supra,* 255 N.E.2d 458 (1970), cert. den. 399 U.S. 919. *Reader's Digest* involved many facts similar to the instant case. One such fact was that Reader's Digest Association published a monthly magazine exempt from taxation under the Illinois equivalent to California's periodical exemption. Despite this exemption, the court held that the presence of Reader's Digest Association's advertising solicitors within Illinois could be considered as one basis for finding sufficient nexus to uphold the taxation of its mail order sales of books and albums to Illinois residents in the face of constitutional objections. Thus, the court said:

> "Through its solicitors in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents." 255 N.E.2d 458, 460.

In light of the above, it is clear that section 6362 is irrelevant to the resolution of the instant controversy.

The Society, as a final point, attacks the California Supreme Court opinion below as having improperly regarded the substantiality of the Society's California business as a "determining factor" with regard to the validity of the disputed use tax collection liability contrary to the holding of this Court in *Nat. Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753 (1967). Jurisdictional Statement, pages 23-25. This point is without merit. The California Supreme Court's reference to the substantiality of the Society's business in this state was merely intended to demonstrate that it could not be dismissed as *de minimis.* This distinction is of critical significance. It has been implicitly recognized in the decisions of this Court that exploitation of the local market of the taxing jurisdiction is a fundamental attribute of nexus. E.g., *Miller Bros. v. Maryland, supra,* 347 U.S. 340, 347 (1954); *Scripto v. Carson, supra,* 362 U.S. 207, 212 (1960). Therefore, had the volume of the Society's California business been inconsequential, a finding of sufficient nexus to support the imposition of the disputed use tax liability would be inappropriate. Clearly, the Court's holding in this regard does not run counter to the *Nat. Bellas Hess* decision or any other decision of this Court.

CONCLUSION

Wherefore, the Board respectfully submits that the issue here involved is so unsubstantial as not to need further argument, and it respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment entered in the case by the California Supreme Court.

DATED: August 17, 1976.

Respectfully submitted,

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(Appendices follow)

APPENDIX

Appendix A

FILED
SEP 14 1973
MARTIN MONGAN, CLERK
By Gerald Gallagher, Deputy

Superior Court of the State of California
For the City and County of San Francisco

No. 577928

NATIONAL GEOGRAPHIC SOCIETY,
Plaintiff,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant.

STIPULATION OF FACTS

IT IS HEREBY STIPULATED by and between the parties hereto by their respective counsel that for the purpose of trial of the above entitled case the facts hereinafter stipulated are true and correct and may be treated by this court as facts proven in open court.

This stipulation shall be the sole and exclusive evidence before the court in the trial of this matter; however, the parties reserve the right to amend this stipulation of facts by further and additional stipulations.

It is agreed, however, that this stipulation shall not be construed as a concession by either party of the relevancy or materiality of any of the facts stipulated herein and the parties hereto expressly reserve the right to argue the relevancy or materiality of any of the facts stipulated herein to be true.

1. National Geographic Society (hereinafter "the Society") is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N. W., Washington, D. C.

2. The State Board of Equalization (hereinafter "the Board") is the agency of the State of California empowered and required to assess and collect liabilities arising under the Sales and Use Tax Law of California.

3. The Society is exempted as an organization from the payment of federal income taxes under Internal Revenue Code section 501(c)(3) as amended.

4. The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890 the Society has supported exploration and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly National Geographic Magazine (hereinafter "the Magazine"), its offerings of maps, atlases, globes, books and through school bulletins, television programs and research reports.

5. The Magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent (5%) of total circulation.

6. Membership in the Society is open to all persons. The majority of such members joined the Society because they desired to obtain the Magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington area. Members presently pay $7.50 a year for membership in exchange for which they receive one year's subscription to the Magazine.

Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indexes); however, they do have the opportunity to purchase items published by the Society from its offices in Washington, D. C.

7. Non-member subscribers to the Magazine (the schools, libraries, bookdealers and corporations referred to in paragraph 5 above) must pay $9.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

8. As of June, 1972, there were approximately 872,000 member subscriptions and 21,000 non-member subscriptions to the Magazine in California.

9. The National Geographic Magazine is exempted from the California Sales and Use Tax as a "Periodical" under California Sales and Use Tax Law § 6362.

10. The Society advertised offerings of maps, atlases, globes and books in the Magazine and by announcements mailed to members and subscribers during all periods relevant hereto. To take advantage of these offerings, an order form enclosed with the mail announcements or an order coupon in the Magazine is removed, completed and mailed to the administrative offices of the Society in Washington, D. C. Deliveries of such publications are made through the mail either directly from the Society's Washington and/or Maryland offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise. Finally, a small volume of merchandise is sold directly over the counter in the Washington, D. C. offices.

11. Although these offerings of maps, atlases, globes and books are made only in the Magazine and in mail announcements, anyone who removes an order coupon from the Magazine may order and receive such merchandise.

12. Since 1956 the Society has maintained two offices in California. One such office has been on the 10th floor of the 31 story Russ Building in San Francisco. Until 1965 the other was on the second floor of a two-story building at 8693 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and secretary.[1]

13. During the period from August 1, 1963 through May 6, 1964, maps, atlases, globes and books of the type described in paragraph 9 were sold to individuals over the counter from the San Francisco and Los Angeles offices of the Society totalling a sales' value as follows:

San Francisco	Los Angeles
$679.20	$2,161.85

14. In comparison with local sales as tabulated in the foregoing schedule, the shipment of maps, atlases, globes and books exclusive of the Magazine to California Society members and residents from orders received at the Washington, D. C. office during the same period totalled a sales' value of $452,470.00.

15. With regard to the sales of maps, atlases, globes and books from the San Francisco and Los Angeles offices of the Society as described in paragraph 13 above, the offices did not verify whether or not a prospective purchaser was a member of the Society and sales could have been made to individuals who were neither members nor subscribers.

16. The Society paid to the Board state and local *sales* taxes plus appropriate penalties and interest upon sales

1. In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970.

totaling $546.20 described in paragraph 13 above during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

17. At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising for the Magazine.

18. During the period from April 1, 1964 to September 30, 1964 the Society made sales of maps, atlases, globes and books to California residents from its Washington, D. C. offices in the manner described in paragraph 10 above in the sum of $83,596.48.

19. Based upon the sales described in paragraph 18 above, the Society paid under protest a use tax collection liability as follows:

Period	State and Local Use Tax Measure of Tax	Collection Liability With Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	38,440.12	1,752.86
	$83,596.48	$3,838.76

20. Two typical issues of the Magazine are attached hereto. These issues exemplify the Magazine during the period in question and today. The offerings of maps, atlases, globes and books in these issues and the order forms which constitute a part of such offerings are typical of the advertised offerings described in paragraph 10 above.

21. The Society has exhausted its administrative remedies and has timely brought this action for refund of the payments described in paragraph 19 above.

22. It is hereby stipulated and agreed by and between the parties hereto, through their respective counsel, that this action may be brought to trial at any time prior to

August 1, 1974 and that the Board hereby waives the provisions of Code of Civil Procedure section 583 up to and including July 31, 1974.

DATED: September 14, 1973.

For the
NATIONAL GEOGRAPHIC SOCIETY

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Appendix B

California Statutes in effect during period in controversy. (Not set forth in Appendix C in Jurisdictional Statement.)

California Revenue and Taxation Code Section 6051:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

California Revenue and Taxation Code Section 6066:

Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. Every application for a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY, *Appellant,*

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, *Appellee.*

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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OPPOSITION TO MOTION TO DISMISS OR AFFIRM

The National Geographic Society opposes the motion to dismiss or affirm filed by the Board of Equalization of the State of California for the reasons set forth in the Society's Jurisdictional Statement filed herein and on the further grounds hereinafter stated.

WITHOUT A *Sales-Related* CONNECTION BETWEEN THE TAXING STATE AND AN OUT-OF-STATE SELLER NO USE TAX LIABILITY CAN BE CONSTITUTIONALLY IMPOSED

In every instance where this Court has spoken with approval of the imposition of sales or use tax on out-of-state sellers (including those relied on by the California Board of Equalization) there was some in-state retail sales-related activity by the out-of-state seller.

Absent this common thread running through all these cases, this Court has refused, on constitutional grounds, to permit assessment of the sales or use tax. There is no case where this Court has upheld a liability for a sales-related tax where the out-of-state seller has confined its sales-related activities to instrumentalities of interstate commerce.

In *Scripto* v. *Carson,* 362 U.S. 207, 211 (1960), "continuous local solicitation" by in-state "salesmen" justified the imposition of use tax liability. In *Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 538-539 (1951), taxation was upheld where the retailer "elected to localize itself in the Illinois market with the advantages of a retail outlet in the State." *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335, 337 (1944), had "traveling salesmen sent into Iowa", and *Standard Pressed Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560, 561 (1975), had a full-time employee living in-state "whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery" which followed a sale. And in *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359, 362, 364 (1941), the seller had 12 retail stores in-state and was qualified to do business in-state.[1]

[1] In its Motion to Dismiss or Affirm (pp. 3, 19-20), the Board has sought to obscure the facts by arguing that the Society should be treated as qualified to do business in California. As was stated in the Society's Jurisdictional Statement (p. 5):

> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register."

The record on appeal clearly establishes the accuracy of this statement. See, Clerk's Transcript on Appeal at 19; Opposition to Petition for Hearing at 27, 29 in the record before this Court. Additionally, the token over-the-counter sales occurred only during the first quarter in issue, not the second quarter. As was noted in the Society's Jurisdictional Statement (pp. 7-8), these sales were regarded as *de minimus* by the California Court of Appeal and were disregarded for purposes of its decision by the California Supreme Court.

Where such sales-related activity is lacking, this Court has refused to permit the states to tax an out-of-state seller.[2] As was stated in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1976):

> ". . . the Court has never held that a state may impose the duty of use tax collection and payment upon a seller whose only connection with *customers* in the State is by common carrier or the United States mail." (emphasis added)

Similarly, in *American Oil Co.* v. *Neill,* 380 U.S. 451, 458 (1965), it was stated that, with respect to a sales-related tax, a company can "exempt itself by a clear showing that there are no in-state activities *connected with* out-of-state sales." (emphasis added.)

It is clear that the Society had no retail sales-related activities in the State of California connected with the

[2] The Board has cited (pp. 10-11, fn. 5) *Reader's Digest Association* v. *Mahin,* 255 N.E. 2d 458 (1970), *cert. denied,* 399 U.S. 919, as being supportive of the decision below. *Reader's Digest,* an Illinois Supreme Court decision and not a decision of this Court, was not referred to by the California Supreme Court below. More importantly, and directly contrary to the Board's assertion, the court in *Reader's Digest* imposed a use tax liability only after finding the company had engaged in extensive *local* advertising consisting of an advertisement of its products in the Chicago Sun Times and 305 local radio and television announcements. Reader's Digest's solicitors also had actively solicited retail sales of books and albums within the state. No local advertising of any kind or in-state solicitation of retail sales is present in the instant case.

mail order sales here in question. Thus, the California Supreme Court has impermissibly extended the limits of use tax collection liability with its holding that an in-state sales-related connection is no longer required to reach out-of-state sales. The "slightest presence" test adopted by the California Supreme Court is directly contrary to the numerous decisions of this Court that the imposition of a sales-related tax must be predicated on in-state sales activity. Such a test would clearly impose far-reaching and undesirable burdens on all retail sales made by interstate mail. Such a test is clearly unconstitutional. Accordingly, the decision of the court below should be summarily reversed.

Respectfully submitted,

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BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
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On Appeal from the Supreme Court of California

BRIEF FOR APPELLANT

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IN THE

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October Term, 1975

No. 75-1868

National Geographic Society, *Appellant*,

v.

Board of Equalization of the State of California, *Appellee*.

On Appeal from the Supreme Court of California

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 547 P.2d 458, 128 Cal. Rptr. 682 (1976) and is printed as Appendix A of the Jurisdictional Statement. The opinion of the Court of Appeal of the State of California, First Appellate District, is unofficially reported at 121 Cal. Rptr. 77 (1975) and is printed as Appendix B of the Jurisdictional Statement.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). This appeal challenges the validity of requiring the National Geographic Society (hereinafter "Society") to collect and pay over California's use tax (California Revenue and Taxation Code §§ 6201-6204, set forth below) on its mail-order sales to California residents on the ground that imposition of

use tax collection liability on such sales is repugnant to the Constitution of the United States.

In 1964 the Board of Equalization of the State of California (hereinafter "Board") notified the Society that it was obligated, under California Revenue and Taxation Code § 6203, to collect use taxes on merchandise sold by mail to California residents, and that, since the Society had not collected such taxes, it was liable for an equivalent sum under § 6204. The Society paid the assessment under protest and brought an action in the San Francisco Superior Court seeking a refund, claiming that the imposition of use tax collection liability was violative of the Due Process Clause and the Commerce Clause of the Constitution of the United States. After trial without a jury and upon stipulated facts, the Superior Court entered an amended judgment in favor of the Society and ordered the Board to refund $3,864.33.

On appeal to the Court of Appeal of the State of California, First Appellate District, this judgment was unanimously affirmed on March 26, 1975. On April 25, 1975, a petition for rehearing was denied. On appeal, the Supreme Court of California, IN BANK (sic), reversed the judgment on April 1, 1976 and remanded for entry of judgment in favor of the Board. Timely notice of appeal to this Court was filed in the Supreme Court of California on June 17, 1976. This Court noted probable jurisdiction on October 12, 1976. Its jurisdiction rests on 28 U.S.C. §§ 1257(2) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the Constitution of the United States.

This case also involves California Taxation and Revenue Code, §§ 6201-04, 6362, set forth below:

6201. *Imposition and rate of use tax.* An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July, 1949, and to and including July 31, 1967, and at the rate of 4 percent on and after August 1 ,1967, and to and including June 30, 1972, and at the rate 3¾ percent thereafter.

6202. *Liability for tax.* Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

6203. *Collection by retailer.* Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the

storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

6204. *Tax as a debt.* The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

6362. *Newspapers and periodicals.* (a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

QUESTIONS PRESENTED

1. Whether imposing use tax collection liability upon an out-of-state organization, which has no retail outlets or retail sales solicitors within the taxing state and whose only contact with customers in the state is through the United States mail, violates the Due Process Clause and the Commerce Clause.

2. Whether the existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the California statute (California Revenue and Taxation Code §6362(a)) and which are dissociated from the transactions sought to be taxed, provides the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

3. Whether the "slightest presence" test formulated by the California Supreme Court conflicts with

this Court's decision in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954) and other cases decided by this Court.

4. Whether the substantiality of an out-of-state seller's mail order sales within a state attempting to impose use tax collection liability on the seller is of any significance in determining whether the imposition of the collection liability is constitutional.

STATEMENT

The Society seeks review of a holding of the Supreme Court of California in favor of the Board rendered on April 1, 1976, in an action brought by the Society to recover certain asserted use tax collection liabilities paid by the Society to the Board under protest and for a declaration of nonliability for use tax collection.

Statement of Facts

The National Geographic Society is a non-profit scientific and educational organization incorporated in 1888 under the laws of the District of Columbia with its administrative offices located at 17th and M Streets, N.W., Washington, D.C. The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society so to register.

The Society is exempt from federal income taxation by reason of section 501(c)(3) of the Internal Revenue Code of 1954, as amended. (26 USC § 501(c)(3)).

The stated objective for organization of the Society is "the increase and diffusion of geographic knowledge." Since 1890, the Society has supported explora-

tion and research projects dedicated to increasing man's knowledge of earth, sea, sky and the universe. The scientific and educational information it obtains is made available to its members and subscribers through its monthly journal, the National Geographic (hereinafter referred to as "magazine" or "National Geographic") its offerings of maps, atlases, globes, books, and through school bulletins, film strips, television programs and research reports.

The magazine, the official journal of the Society, is furnished only to members of the Society except for subscribing schools, libraries, bookdealers and corporations which represent less than five percent of the total circulation.

Membership in the Society is open to all persons. The majority of such members join the Society because they desire to obtain the magazine. Applications for membership must be completed and mailed to the Society's headquarters in the Washington, D.C. area. Members presently pay $8.50 a year for membership in the United States, in exchange for which they receive one year's subscription to the magazine. Members do not become entitled by virtue of their membership status to any other publications or articles of merchandise free of charge (except six month indices); however, they do have the opportunity to purchase items published by the Society from its offices in the Washington, D.C. area.

Non-member subscribers to the magazine (the schools, libraries, bookdealers and corporations referred to above) must pay $10.00 a year and are primarily restricted to institutions that are not eligible for individual membership in the Society.

As of June, 1972, there were approximately 872,000 member subscribers and 21,000 non-member subscribers in California.

The National Geographic is exempted from the California Sales and Use Tax as a "periodical" by the California Revenue and Taxation Code § 6362.

The Society announced offerings of maps, atlases, globes and books in the magazine and by circulars mailed to members and subscribers from outside California. To take advantage of these offerings, an order form enclosed with the mail circulars or an order coupon in the magazine is removed, completed and mailed to the administrative offices of the Society in the Washington, D.C. area. Deliveries of such publications are then made through the U.S. mail directly from the Society's Washington, D.C. area offices. Payment for the merchandise ordered is either cash with order or by a mailed billing following the purchaser's receipt of the merchandise.

Since 1956, the Society has maintained two offices in California. One such office has been on the 10th floor of the 31-story Russ Building in San Francisco. Until 1965, the other was on the second floor of a two-story building at 8639 Wilshire Boulevard in Beverly Hills. Each office was staffed by a manager and a secretary.[1]

[1] In June, 1965, the Los Angeles office was relocated to the eighteenth floor of the 25-story California Savings and Loan Association Building located at 5670 Wilshire Boulevard, Beverly Hills. From July 1967 to June 1972, the Los Angeles office has been staffed by two salesmen and two secretaries. The San Francisco office did not relocate. In October 1968 it added a salesman. A second secretary was added in January, 1970. (It should be noted that these salesmen solicit only advertising copy, which is accepted or rejected in Washington, D.C.).

During the period from August 1, 1963 through May 6, 1964, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amounts of $679.20 and $2,161.85, respectively.[2]

The Society paid to the Board state and local sales taxes, plus appropriate penalties and interest, on over the counter sales described above totaling $546.20 during the period April 1, 1964 to May 6, 1964. The Society does not seek refund of these taxes, penalties and interest.

At all times other than during the period from August 1, 1963 to May 6, 1964, no sales were made from the San Francisco and Los Angeles offices of the Society and said offices were again restricted in authority and function to solicitation of advertising copy for the magazine.

During the period from April 1, 1964 to September 30, 1964, the Society made sales through the U.S. mail of maps, atlases, globes and books to California residents from its Washington, D.C. area offices in the manner described above in the sum of $83,596.48.

Based upon the mail order sales described above, the Society paid under protest a use tax collection liability as follows:

Period	Measure of Tax	State and Local Use Tax Collection Liability With Interest and Penalties
4/1/64-6/30/64	$45,156.36	$2,085.90
7/1/64-9/30/64	$38,440.12	$1,752.86

[2] All local sales were regarded as *de minimus* by the California Court of Appeal and were disregarded for purposes of its decision by the Supreme Court of California.

All California mail order sales were accepted in the Washington, D.C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales.

The Society sells globes, atlases, books and maps to its members, on orders mailed from all over the world to its headquarters in the Washington, D.C. area. These mail order sales are an important means by which the Society achieves its educational and scientific purposes of increasing man's geographic knowledge of the earth, sea, sky and universe, referred to above.

How The Federal Questions Were Raised And Decided Below

The Society's Claim for Refund filed on September 27, 1966 was based on the grounds that imposition of use tax collection liability on the Society violated due process and constituted an undue burden on interstate commerce, and that the Society was not a "retailer" (as defined in California Taxation and Revenue Code, § 6203).

In its suit in the Superior Court of California, the Society also argued that the imposition of use tax collection liability on its mail-order business was in violaton of the Due Process Clause and Commerce Clause of the United States Constitution for the reason that there was insufficient "nexus" between the State of California and the Society to permit the State of California to impose the use tax collection liability on the Socety's out-of-state mail-order sales. The Superior Court entered judgment (and an amended judgment) in favor of the Society.

In the appeal to the California Court of Appeal, that court adopted the Society's statement of the question presented as the sole issue to be decided: "The sole question presented in this case is whether [the Society's] activities in the State of California provided sufficient nexus to support the constitutional imposition of a use tax collection liability measured by [the Society's] gross receipts from its sales of maps, atlases, globes and books from its District of Columbia and Maryland offices to California residents during the period from April 1, 1964 to September 30, 1964."

The court then stated the Board's contentions as follows:

> "During the time period for which the Board seeks the use taxes, the Society's sole contacts in California were the maintenance of two small offices in the state, each of which was staffed with a secretary and a salesman whose purpose was to solicit advertising to appear in the Magazine. The Board contends that the maintenance of the two offices for even that limited purpose subjects the Society to payment of use taxes on the mail order sales made outside the state to residents of the state. The Board contends that the imposition of the tax collection does not violate either the due process clause or the commerce clause of the United States Constitution." [footnote omitted]
>
> App. B of Jurisdictional Statement at pages 21a-22a.

The unanimous decision of the appellate court squarely rejected the Board's contentions:

> "However, the question must also be asked whether the Society's in-state activities were connected with the out-of-state sales. No real link may be established between the two. The Society main-

tained two small offices in California. A function of the secretary and salesman in each office was to solicit businesses to advertise their merchandise and services in the Magazine. The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars.

* * *

"The Society's activities in California are so dissociated from the activities sought to be taxed that there is no justiciable relationship between the two.

"The soliciting in California of advertising for the Magazine does not provide the minimal nexus which is required for this state constitutionally to impose use taxes on the Society's mail order sales to California residents."

App. B of Jurisdictional Statement at pages 26a, 33a.

After the Board's petition for rehearing was denied by the Court of Appeal, the Board filed a Petition for Hearing before the Supreme Court of California.

In its opinion, the Supreme Court of California stated the question before it as follows:

> "Essentially our task is to decide whether the activities of the Society in California constitute a sufficient nexus between this state and the Society so as to justify against constitutional attack the imposition of a use tax collection liability in respect to certain merchandise purchased by California residents by mail orders to the Society's out-of-state offices."
>
> App. A of Jurisdictional Statement at page 1a.

In rejecting the opinion of the Court of Appeal, the California Supreme Court formulated a principle it felt applicable to all such cases, and concluded as follows:

> "We are satisfied that from the above cited decisions the following principle can be distilled and we thus hold: Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, *the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so.*
>
> * * *
>
> "We conclude that the imposition of use tax collection liability on the Society violates neither the due process clause of the Fourteenth Amendment to the United States Constitution nor the Commerce clause of said Constitution." (emphasis added)
>
> App. A of Jurisdictional Statement at pages 8a, 16a.

SUMMARY OF ARGUMENT

A state may not impose use tax collection liability on an out-of-state seller with respect to its mail order sales if the seller has engaged in no in-state, sales-related activities.

The National Geographic Society has no in-state, sales-related activities to warrant the imposition of a use tax liability for its mail order sales.

The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transactions sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales.

The National Geographic Society has no in-state connection with customers as is required by *National Bellas Hess* for the imposition of use tax collection liability.

The advertising solicitation activities of the National Geographic Society are clearly dissociated from the interstate mail order sales of the Society to California customers.

ARGUMENT

I. A STATE MAY NOT IMPOSE USE TAX COLLECTION LIABILITY ON AN OUT-OF-STATE SELLER WITH RESPECT TO ITS MAIL ORDER SALES IF THE SELLER HAS ENGAGED IN NO IN-STATE, SALES-RELATED ACTIVITIES

This case presents the simple question of whether the California Supreme Court may disregard the applicable decisions of this Court and impose use tax collection liability on the National Geographic Society with respect to its out-of-state mail order sales, when the Society had no activities in the state of California related to such sales. As construed by California's highest court, the California Revenue and Taxation Code's, §§ 6203 and 6204, enable the State of California to impose a use tax collection liability on any out-of-state mail order seller whenever there is the "slightest presence" of the seller in California, regardless of whether that "slightest presence" has

any connection with the seller's out-of-state retail mail order activities. Such a test goes far beyond the limits set by this Court in prior cases, for this Court has upheld the imposition of use tax collection liability on mail order sellers (*i.e.* has found a constitutionally valid "nexus" between the state and the mail order seller's activities) *only* when the seller has engaged in activities within the taxing state which are related to the seller's out-of-state mail order activities.

In *no* case has this Court upheld use tax collection liability where the out-of-state seller has confined its sales-related activities exclusively to instrumentalities of interstate commerce. In the absence of local, in-state contact with customers, the "definite link" between the "state and the person, property or transaction it seeks to tax" (*Miller Bros* v. *Maryland,* 347 U.S. 340, 344-345 (1954)) is lacking and the constitutionally valid "nexus" to support use tax collection liability does not exist.

This requirement of an in-state "connection with customers" was made abundantly clear in this Court's most recent use tax collection liability case—*National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967). In applying the constitutional principles of the Due Process Clause and the Commerce Clause, the Court noted that it has upheld the power of a state to impose collection liability in a variety of circumstances but that it "has *never* held that a State may impose the duty of use tax collection and payment upon a seller whose *only connection with customers* in the State is by common carrier or by United States mail." (Emphasis supplied.) In recognizing that this distinction has been consistently applied, the Court stated (386 U.S. at p. 758):

* * *

"Indeed, in the Sears, Roebuck case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that 'those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price.' 312 US at 365, 85 L ed at 892, 132 ALR 475. And in Miller Bros. Co. v. Maryland, 347 US 340, 98 L ed 744, 74 S Ct 535, the Court held that Maryland could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland."

In *National Bellas Hess*, Illinois had sought to impose a use tax collection liability on Hess' mail order business based in Kansas City, Missouri. The basis cited by Illinois for imposing a use tax collection liability on Hess' mail order sales was the mailing into Illinois by Hess of its catalogues and advertising flyers. This was regarded by Illinois as being an exploitation of the Illinois market sufficient to result in "nexus" between Illinois and Hess, notwithstanding the absence of *in-state* sales activities by Hess.

In its review, this Court noted that all of Hess' contacts with Illinois were via the United States mail or common carrier, and accordingly, held that, lacking any in-state retail contact with the Illinois consumers, Hess could not be held liable by Illinois for the use tax. The basic distinction between exclusively interstate contact with customers, and in-state sales activity, was considered valid and the Court declined to obliterate this distinction. 386 U.S. at p. 758.

It is this distinction that the California Supreme Court has disregarded in the instant case, as the Illinois court sought to disregard the same issue in *National Bellas Hess*. The National Geographic Society has absolutely no in-state contact with the California customers who purchase products of the Society exclusively by means of interstate facilities. Yet, because of the existence in California of two offices of the National Geographic Society which merely solicit national advertising for the National Geographic, the California Supreme Court maintains that this *admittedly non-sales-related activity* of the Society is sufficient to justify the imposition of a use tax collection liability on the Society's mail order sales. The California court has simply chosen to ignore the clear language of this Court in *National Bellas Hess* and predecessor cases.

In *each* case where this Court has sustained a sales-related tax, there has been substantial local involvement of in-state contact with customers. In *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the state of Iowa was permitted to impose its use tax on the mail order sales of Sears Roebuck where that company had 12 retail stores in-state and was qualified to do business in the state. In addition to the in-state retail activity of Sears, the record before the Court also reflects that, although Sears agents in Iowa did not actually solicit or place mail order sales, the in-state stores assisted in the processing of such orders. These orders were considered by the Court as "a part of" Sears' business in Iowa. It held that Sears could not avoid the tax because its "business [obviously referring to its retail sales business] was departmentalized." In light of the extensive in-state retail activity of Sears, the Court stated that Iowa could rightly assume that Sears' mail order sales were not unrelated to Sears' course of business in Iowa. Because Sears had

been extended the privilege of doing business in Iowa, the Court held that Iowa was not incapable of reaching Sears for the tax on mail order sales, and could "exact this burden as a price of enjoying the full benefits flowing from its Iowa business." 312 U.S. at p. 364.

In *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373 (1941), a substantially identical companion case to *Sears Roebuck & Co.*, there was present a further fact which, in the Court's opinion, required upholding the imposition of the Iowa use tax on Montgomery Ward's mail order sales. Montgomery Ward's retail stores had engaged in local advertisements of the mail order merchandise which the Court regarded as being the equivalent of in-state solicitation by local agents. Local solicitation of orders had been previously held as being in-state, sales-related activity which justified a sales-related tax on mail order sales. See *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62 (1939). Likewise, Montgomery Ward processed some mail orders over the counter in its Iowa retail stores.

Subsequent decisions of this Court have reaffirmed the principle that there must be in-state sales-related activities to support a use tax collection liability. In *General Trading Co.* v. *State Tax Commission,* 322 U.S. 335 (1944), the property on which the use tax was laid was sent into Iowa, the taxing state, as a result of orders solicited by traveling salesmen sent into Iowa from the company's Minnesota headquarters. The Court deemed this local activity sufficient to sustain collection liability for such use tax.

Similarly, in *Scripto* v. *Carson,* 362 U.S. 207, decided in 1960, the presence of in-state, independent wholesalers, or jobbers, who solicited orders for mail order sales of Scripto's products was determined to be a sufficient local activity to justify the imposition of the Florida use tax collection liability on the mail order sales. In fact, as the Court noted, the only incidence of the sales transaction that was non-local was the acceptance of the order. The test, stated the Court (362 U.S. p. 211-212) is "simply the nature and extent of the activities of [Scripto] in Florida;" the "continuous local solicitation" (362 U.S. at p. 211) by Scripto's representatives provided the required "minimum connections". The Court again repeated the requirement previously set forth in *Miller Brothers* that there must be an in-state "exploitation of the consumer market" before use tax collection liability may be constitutionally imposed.

In the early cases in this Court involving sales-related taxes, there was always clear in-state retail activity. See, e.g., *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra* (local retail sales agents); *Bowman* v. *Continental Oil Co.,* 256 U.S. 642 (1921), (local distributor and dealer); *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86 (1934), (local refining, storage and distributing facilities).

Notwithstanding this Court's consistent requirement of a local sales-related connection between the state and the transaction or activity sought to be taxed, the California Supreme Court has enunciated a new test that the "slightest presence" of a seller within a taxing state will permit that state constitutionally to impose a use tax collection liability on out-of-state mail order sales. There can be little doubt that this "slightest presence" test is in direct conflict with the "defi-

nite link" test expressed in *Miller Brothers,* and with the requirement set down by this Court in that case that there be an "invasion or exploitation of the consumer market" by in-state activities before use tax collection liability can be imposed.

In 1954, this Court held in *Miller Brothers* v. *Maryland,* 347 U.S. 340, that Maryland could not constitutionally impose its use tax upon a Delaware-based furniture store where the seller's *only* contact with Maryland was the occasional delivery of goods sold at its Delaware store into Maryland by the seller's own truck. In reviewing the principles governing local taxing authority, it was stated (347 U.S. at p. 344-345):

> ". . . due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The Court distinguished cases involving traveling sales agents (e.g., *General Trading Co.* v. *State Tax Commission, supra*) which, in its judgment, constituted "active and aggressive operation within a taxing state," from the "occasional delivery of goods" in-state which did not, in the Court's opinion, constitute "invasion or exploitation of the consumer market in Maryland." In the absence of such "invasion or exploitation of the consumer market," it was held that the "minimum connection" to justify the imposition of a use tax liability was lacking.

II. THE NATIONAL GEOGRAPHIC SOCIETY HAS NO IN-STATE, SALES-RELATED ACTIVITIES TO WARRANT THE IMPOSITION OF A USE TAX LIABILITY FOR ITS MAIL ORDER SALES

A. The existence of two offices in the taxing state, which are part of an activity specifically exempted from tax by the state and which are dissociated from the transactions sought to be taxed, does not provide the minimal nexus required to impose a use tax collection liability on an out-of-state seller's mail order sales

The Supreme Court of California held that the "slightest presence" within the state, without regard to the nature of that presence, permits the state constitutionally to impose on a mail order seller the duty of collecting the use tax from mail order purchasers and the liability for failure to do so. A long line of cases in this Court, however, has held that only where the "presence" of an out-of-state seller manifests itself through retail outlets or in-state retail solicitors for the sale of tangible personalty may the state constitutionally impose such a duty; and a sharp distinction must be drawn between "mail order sellers with *retail* outlets, solicitors or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 758 (1967) (emphasis added.) Moreover, if a seller's activities within the state are dissociated from the activity sought to be taxed, then no constitutionally sufficient "nexus" for imposition of the tax exists. See, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951).

The California Supreme Court concluded that since the Society maintains an "office" within California

—the two offices from which the Society solicits advertising for its tax-exempt magazine—it falls within California Revenue and Taxation Code, § 6203, and has the duty of collecting use taxes on its mail order sales. The mere existence of an "office" in California does not automatically make imposition of the use tax collection liability constitutional.[3] There must be some connection—"some definite link" in the words of *Miller Bros. Co.* v. *Maryland, supra*—between such an office and the out-of-state sales; in the instant case, that connection is lacking. The California Supreme Court in attempting to show some "slight presence"

[3] In *Montgomery Ward and Co., Inc.* v. *State Board of Equalization*, 272 CA2d 723, 78 Cal. Rptr. 373 (Ct. App. 1st Dist. 1969), *petition for hearing denied* (Sup. Ct. Calif., August 6, 1969), *cert. den.* 396 U.S. 1040 (1970), the Court struck down the California use tax on certain out-of-state sales by Montgomery Ward and clarified the nature and quality of the constitutionally required nexus between the activity to be taxed and the taxing state. The Court held that due process was violated by the State of California requiring Montgomery Ward to collect use taxes on certain of its Nevada and Oregon sales to California residents, even though Montgomery Ward operated 21 retail stores in California and maintained its regional office in California. The Court states that:

> "California may not burden a foreign corporation's out-of-state business as a condition of permitting it to do business within the state. *The protection afforded and the benefits conferred must have some relationship to the transaction which the State seeks to burden.*" (emphasis supplied)

The fatal defect in the state's case was its failure to show that the intrastate activities contributed to the sales made by the border stores to residents of California. The Court stated *inter alia* that:

> "The existence of a regional headquarters in Oakland, with administrative jurisdiction over the border states, among others, is not determinative. There is nothing to show any particular contribution to the sales in question here. *Certainly the existence of this headquarters could not give California the right to tax or impose burdens on all sales in all states throughout the region.*" *Montgomery Ward, supra*, at 382-383. (emphasis supplied)

could point only to the two advertising offices. These two offices which the Society maintains in California are there solely for the purpose of soliciting national advertising copy, a non-tangible item, for the Society's magazine, which is tax-exempt under California law. These offices have never serviced in any way the Society's mail order sales.

The Supreme Court of California found that both the Society's magazine and the Society's mail order merchandise served the same purpose, i.e., to make information gathered by the Society available to its members. From this the court concluded that both media are *used* by California residents; therefore, the mail orders are a part of the Society's business in California. The court concluded that the Society's California business was merely "departmentalized" and, therefore, under the doctrine of *Nelson* v. *Sears Roebuck & Co.*, 312 U.S. 359 (1941), the Society was subject to the use tax collection liability.[4]

The holding in *Sears* does not support such a conclusion. In that case, imposition of the use tax was clearly justified and reasonable since the taxpayer was fully exploiting the consumer market through sales of tangible consumer products by local retail establishments. Such a local presence involving solicitation of tangible retail sales provides an appropriate nexus to justify imposition of the use tax when coupled with

[4] The Court of Appeal properly reached a contrary conclusion, stating:

> • • • The solicitation of advertisements to appear in the Magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the Magazine or in mailed circulars. (App. B. of Jurisdictional Statement at page 26a.)

qualification to do business in the state. In *Sears,* the in-state activities which supplied the nexus for the use tax were virtually identical to the out-of-state transactions sought to be taxed; the same products were sold to Iowa customers in both the mail order operation and the local retail operation, both being related to the same overall sales effort. In this case there is no similarity between the purchase of advertising space by national firms in the Society's exempt magazine (such sales to be consummated in Washington) and the sale of globes, books, maps and atlases by mail order in interstate commerce to California residents. The Society's solicitation of advertising is certainly not a retail function, and the facts of this case bear no resemblance to those in *Sears.*

As noted above, in the *Sears* case, the finding that mail order sales in Iowa were part of Sears' course of business in that state was clearly dependent upon the fact that Sears was qualified to do business in Iowa as a foreign corporation. The Court stated that Sears could not be reached for use tax if it were not qualified to do business in Iowa, because of the impotence of the state power, and recognized that other mail order firms not doing business as foreign corporations in Iowa could not constitutionally be subjected to this use tax.

A primary corporate purpose of the Society is to promote "the increase and diffusion of geographic knowledge." Necessarily, both the magazine and mail order merchandise sold by the Society attempt to accomplish that purpose. The California court's attempt to establish a connection between the magazine advertising solicitation activities of the Society's California offices and the Society's mail order sales because of this similarity in purpose ignores the separately distinct

nature and dissociation of the two activities. An excise tax case, *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), is more analogous to the instant case than is *Nelson* v. *Sears, Roebuck & Co., supra,* and provides the best guidance in the situation where in-state activities are totally dissociated from out-of-state sales.[5]

B. The National Geographic Society has no in-state connection with customers as is required by *National Bellas Hess* for the imposition of use tax collection liability.

The Society's exclusive connection with its mail order sales customers is by means of interstate facilities. Offerings of maps, atlases, globes and books were announced in the Society's official journal, the National Geographic, which is sent only to its members (and a relatively small number of subscribing schools, libraries, bookdealers and corporations) and by circulars mailed from outside California to such members and subscribers. A prospective purchaser would take advantage of these offerings by completing an order form enclosed with the mail circulars, or an order coupon attached to the magazine, and mailing the form or coupon to the administrative offices of the Society in the Washington, D. C. area. Payment for the merchandise so ordered was either by cash with the order or by a mailed billing from the Washington, D.C. area headquarters following the purchaser's receipt of the merchandise. As can be readily seen, the United States mail was the exclusive contact between the Society and the California customers.

The "slightest presence" of the Society in California that the California Supreme Court seized upon as jus-

[5] See discussion of *American Oil* under heading III, *infra,,* at page 29.

tifying the imposition of the use tax liability was two national advertising solicitation offices for the magazine which the Society maintained in California. During the two quarters in issue, April 1, 1964 through June 30, 1964, and July 1, 1964 through September 30, 1964, both offices were staffed by a manager and a secretary.

The advertising offices have been maintained by the Society since 1956, and, with the exception of the short period from August 1, 1963 to May 6, 1964, they have been restricted in authority and function exclusively to the solicitation of national advertising copy for the magazine. During this August 1, 1963 through May 6, 1964 period, a small number of maps, atlases, globes and books were sold to individuals over the counter from the San Francisco and Los Angeles offices in the amount of $679.20 and $2,161.85, respectively.[6]

The appropriate taxes have been paid on these over-the-counter sales and no refund of these taxes is being sought by the Society.

During the two quarters in issue (April 1, 1964 through September 30, 1964), the Society made sales through the United States mail of maps, atlases, globes and books to California residents from its Washington, D. C. area offices in the manner described above in the sum of $83,596.48. All mail order sales were accepted in the Washington, D. C. area and mailed into California. At no time were the advertising solicitation offices of the Society in California in any way involved in these mail order sales. The position of the

[6] These local sales were regarded as *de minimus* by the California Court of Appeal and were disregarded by the California Supreme Court for purposes of its decision.

California Supreme Court that the advertising offices provided a sufficient nexus to tax the Society's mail order sales is, in substance, no different than saying that an in-state photographic or scientific expedition of the Society would constitute a sufficient nexus. The next logical step in the lower court's argument would be to say that the employment of, or contractual arrangement with, a scientist having an office in California or the sending of a single employee of the Society to California to examine a prospective site for a scientific or photographic expedition of the Society would be sufficient nexus to tax mail order sales.

The principle established by this Court in *National Bellas Hess* and its predecessor cases, that out-of-state mail order sales will be free from a local sales-related tax so long as the vendor abstains from any in-state sales-related activity, provides a logical and fair standard, as opposed to the patently unfair and illogical "slightest presence" test. In its attempt to reconcile its "slightest presence" test in the face of the in-state sales-related activity requirements, the California Supreme Court was compelled to paraphrase this Court's opinion in *National Bellas Hess:*

> "It is clear that where the out-of-state mail order seller's connection with the taxing state is *solely* by instruments of interstate commerce—e.g., by common carrier or the United States mail—the state has given nothing for which it can ask return. Indeed in *Nat. Bellas Hess*, the Supreme Court took pains to point out that it 'has never held that a State may impose the duty of use tax collection and payment' under such circumstances. (386 U.S. at p. 758, 87 S.Ct. at p. 1392.) Accordingly it held that Illinois could not constitutionally impose a use tax collection liability upon a mail order house whose principal place of business was in Missouri

> and whose only contacts with Illinois were by United States mail or common carrier since in the circumstances of that case it would amount to a tax on the privilege of doing interstate business and would be violative of the commerce clause." App. A of Jurisdictional Statement at page 7a.

The critical language of the California Supreme Court is the substitution of the phrases "connection with the taxing state" and "contacts with Illinois" for the language actually used by this Court in *Hess* (386 U.S. p. 758) of "connection with *customers.*" (Emphasis added.) In context, the language in *Hess* reads (386 U.S. at p. 758):

> But the Court has never held that a state may impose the duty of use tax collection and payment upon a seller *whose only connection with customers* in the State is by common carrier or the United States mail. (Emphasis added.)

This, we submit, is a key distinction which the California Supreme Court has obviously attempted to disregard. The stated requirement of this Court is that there be in-state contacts with *customers* before there can be a use tax liability for mail order sales, and that a totally non-sales-related contact by the out-of-state seller with the *state* will not suffice.[7]

[7] The Supreme Court of California also pointed to, but misconstrued, this Court's recent decision in *Standard Steel Co.* v. *Washington Revenue Department,* 419 U.S. 560 (1975), as supportive of its decision in the instant case. In that case the out-of-state seller's contact with the taxing state was the presence therein of one full-time engineer. The engineer, however. worked closely with the in-state customer and advised the customer as to what products it needed from the seller. Although the engineer did not take sales orders himself, by advising the customer as to its needs, he occupied a role little different from the travelling salesmen in *General Trading Co.* v. *Tax Commission,* 322 U.S. 335 (1944), or the local brokers, wholesalers and jobbers in *Scripto* v. *Carson,* 362 U.S. 207 (1960). The personnel in the Society's California offices have no contact of any kind with mail order customers of the Society, for the simple reason that those offices have no retail function related to mail order sales.

III. THE ADVERTISING SOLICITATION ACTIVITIES OF THE NATIONAL GEOGRAPHIC SOCIETY ARE CLEARLY DISSOCIATED FROM THE INTERSTATE MAIL ORDER SALES OF THE SOCIETY TO CALIFORNIA CUSTOMERS

The concept of the "dissociation" of certain activities of a commercial enterprise from its other activities has long been recognized by this Court as a basis for testing the constitutional validity of attempted state taxation of interstate commercial activity. *American Oil Co.* v. *Neill,* 380 U.S. 451 (1965), provides an excellent example of this concept of dissociation.

In *American Oil,* this Court rejected Idaho's attempt to impose an excise tax on gasoline sold by an oil company to the Atomic Energy Commission (A.E.C.), where the solicitation and acceptance of the sales contract occurred outside Idaho, and the delivery and transfer of title took place outside of that state, even though it was integral to the transaction that the gasoline be brought to the A.E.C.'s Idaho facility for storage by means of a common carrier. The Oil company was a licensed dealer and maintained offices in Idaho, but the Court found there was no indication that any of the in-state activities of the company contributed in any way to the procurement or performance of the A.E.C. contract. In analyzing the constitutional basis for upholding or rejecting the excise tax on the out-of-state sale, the Court stated:

> "[The] cases have also firmly established the doctrine that when a tax is imposed on an out-of-state

vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite of state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-345, 98 L ed at 748. Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances the transactions are said to be 'dissociated from local business'. Norton Co. v. Department of Revenue, supra, 340 U.S. at 537, 95 L ed at 521, [Gross Receipts Tax], and therefore may not, consistent with due process, be taxed." 380 U.S. at 458.

The California Supreme Court attempted to distinguish *American Oil* on the grounds that in *American Oil,* the seller was not "responsible" for shipping the gasoline into Idaho, whereas, in the instant suit, the Society was "responsible" for placing its mail-order merchandise into interstate commerce for in-state destination. This is a meaningless distinction. In both cases, all aspects of the *sales* were wholly out-of-state and not reachable by an in-state *sales, use* or *excise* tax. The fact that the Society used an interstate facility to ship merchandise to an in-state purchaser *after* an out-of-state sale had been completed, as opposed to the purchaser arranging for the interstate facility to ship the merchandise in-state, changes nothing. The critical

point in both cases is whether there is sufficient in-state sales-related activities of the seller to tax the out-of-state sales of that seller. This point was expressly recognized as being decisive in *American Oil*:

> "... it is plain that neither Utah Oil's possession as a licensed dealer in Idaho nor the fact that it otherwise engaged in business there will suffice to uphold the tax. Utah Oil's transfer of gasoline was unquestionably an out-of-state sale vis-a-vis Idaho and *entirely unconnected with its business in that state.*" (Emphasis added.) 380 U.S. at p. 458

So too, the advertising solicitation of the Society in California is "entirely unconnected" with its mail order sales to California customers.

The California Supreme Court has also attempted to avoid the decision in *American Oil* by stating that the concept of "dissociation" discussed in *American Oil,* an *excise* tax case, does not apply to a *use* tax case. Such a distinction is also inappropriate. The impact of a sales tax, an excise tax, or a use tax, is identical. In fact, the California Supreme Court, noting the "difficult, if not insuperable, administrative problem for the taxing state" to collect the use tax directly from each resident purchaser, refers to § 6204 of the California statute. That section provides that the tax required to be collected by the retailer constitutes a "debt" owed by the retailer to the state. Thus, the vendor is entirely responsible for the use tax to the same extent that he would be responsible for a sales or excise tax. Of course, each of these taxes is customarily passed on to the purchaser, but the liability nevertheless remains with the vendor.

The interchangability, or inter-applicability, of these sales-related taxes is apparent from a reading of the cases cited by this Court in its discussion of the principles applicable in sales-related tax cases. For example, *Miller Brothers Co.* v. *Maryland, supra,* a use tax case, was cited by the Court in *American Oil,* an excise tax case, as principal authority for the requirement that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." 380 U.S. at p. 458. In turn, *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951), a gross receipts tax case, was cited as authority for the "dissociation" test in *American Oil.* 380 U.S. at p. 458.

The California Supreme Court was totally in error in its analysis of the impact of *Norton Co.* v. *Department of Revenue, supra,* a gross receipts tax case, on a sales-related tax case. It is clear that when the language of the *Norton* case is read in context, the principle of "dissociation" articulated in that case is fully applicable to a sales or use tax case. The Court stated (340 U.S. at p. 537):

> "Unless some local incident occurs sufficient to bring the *transaction* within [the state's] taxing power, the vendor is not taxable. McLeod v. J. E. Dilworth Co. 322 U.S. 327, 88 L ed 1304, 64 S Ct 1023, 1030. Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor." (Emphasis added.)

Stating that sales and use tax cases are not *controlling* does not mean that they are not *applicable* in a gross

receipts tax case. The obvious import of this language is that the relationship of the in-state activities to out-of-state sales must be greater to sustain a gross receipts tax than it is to sustain a sales or use tax. Nevertheless, it is clear that the Court's language recognizes that the dissociation test is applicable in a sales or use tax case, just as it is in a gross receipts tax case, or, as later shown in *American Oil Co.*, in an excise tax case. Once it is recognized that the test *may* be applied to National Geographic Society's activities, there should be no question but that the Society's in-state advertising solicitation activities cannot supply the requisite nexus to impose a use tax collection liability on the Society with respect to its mail order sales.

CONCLUSION

It is clear that the Society had no retail sales-related activities in California in connection with the mail order sales here in question. No link can be established between the Society's in-state solicitation of advertising copy and the out-of-state sales, as the solicitation of advertisements had no effect upon whether California residents would purchase products of the Society which they saw announced in the magazine or in the mailed circulars. The "slightest presence" test adopted by the California Supreme Court has impermissibly extended the limits of use tax collection liability and is directly contrary to the numerous decisions of this Court to the effect that the imposition of a sales-related tax must be predicated on in-state sales activity. The "slightest presence" test would not only impose far-reaching and undesirable burdens on all retail sales made by inter-state mail, but is also clearly unconsti-

tutional. Accordingly, the decision of the lower court should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

vs.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

Brief of Appellee

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OPINION BELOW

The opinion of the Supreme Court of California is reported in the official reports at 16 Cal.3d 637 and in the unofficial reports at 128 Cal. Rptr. 682 and 547 P. 2d 458.

QUESTION PRESENTED[1]

Whether the National Geographic Society's activities in the State of California provided sufficient nexus as required by the Due Process Clause and Commerce Clause to support

1. The four questions posed by the National Geographic Society (Brief of Appellant, pages 5-6) are so phrased as to constitute premature legal argument.

the imposition of a California use tax collection liability measured by its sales prices on mail order sales of maps, atlases, globes and books to California residents.

STATEMENT OF FACTS[2]

The National Geographic Society (hereinafter "the Society") is a District of Columbia Corporation publishing a monthly magazine known as The National Geographic Magazine (hereinafter "the Magazine"). (A 41-42[3]). The Society also sells maps, atlases, globes and books. (A 42). The stated objective of the Society is "the increase and diffusion of geographic knowledge," and the scientific and educational information it obtains is made available to its members and subscribers both through the Magazine and through its offerings of maps, atlases, globes and books. (A 42).

At all times relevant hereto, the Society was physically present within the State of California insofar as it had voluntarily entered and established two employee-staffed offices—one in San Francisco and the other in Beverly Hills. (A 43). These offices were originally staffed with one salesman and one secretary each, but both offices have since doubled their personnel. (A 43). The basic function of these offices was to solicit advertising for the Magazine. (A 44). However, during the nine month period from August 1, 1963, to and including May 6, 1964, the Society also used these offices to make over-the-counter sales of its maps, atlases, globes and books to Californians. (A 43-44). While these sales were modest in volume ($2,841.05), they nevertheless represented retail sales of tangible personal property within California which were not in the nature of occasional sales. *Id.*[4]

2. This action was tried upon stipulated facts, no evidence having been presented during the trial of this matter.

3. All references to the Appendix on file with this Court shall be designated "A" followed by the page number.

The Society paid sales taxes to the Board of Equalization of the State of California (hereinafter "the Board") measured by its over-the-counter California sales receipts and does not contest the correctness of its liability in this regard. (A 44).

During the overlapping period from April 1, 1964, to September 30, 1964, the Society also sold its maps, atlases, globes and books by mail from its District of Columbia offices to Californians in the aggregate sum of $83,596.18. (A 44). The Society advertised offerings of these items in the Magazine and by announcements mailed to all members and subscribers. *Id.* Forms or coupons were attached to these advertisements for use in placing orders with the Society. *Id.* These offerings were also in the Magazine subscribed to by some 20,000 schools, libraries, bookdealers and corporations, and anyone with access to the Magazine could remove the order coupon and purchase these articles from the Society. (A 42, 44). These orders were mailed to the Society's District of Columbia offices and filled by postal deliveries of the merchandise to the purchaser from the Society's District of Columbia and Maryland offices. (A 44).

4. At page 6 of Brief for Appellant, it is improperly stated as fact:

> "The Society is not registered to do business in the State of California and does not engage in activities in the State of California which would require the Society to register."

There is nothing in the record before this Court to the effect that the Society was not registered to do business in California save and except the assertions of the Society which are not included within the stipulated facts nor otherwise a part of the evidence presented herein. Moreover, the Society's over-the-counter sales, above described, clearly contradict the assertion that the Society did not engage in activities within the State of California which would require registration.

Payment was either on a cash with order basis or a later billing basis. *Id.*

The Board assessed a use tax collection liability against the Society, measured by the sales prices on these mail order sales to California residents. (A 45). The Society paid the assessment under protest and commenced the instant action for refund. *Id.*

SUMMARY OF ARGUMENT

The California use tax collection liability here imposed with regard to the Society's mail order sales of maps, atlases, globes and books to California residents arises under California Revenue and Taxation Code section 6203 which requires, for purposes here relevant, that foreign retailers maintaining offices in California collect the use tax. This requirement does not penalize the foreign retailers; on the contrary, it merely subjects them to a tax equal to the California sales tax borne by local retailers thereby promoting competitive parity.

Under the decisions of this Court, the Society's California activities are not required to bear a direct relationship to the mail order sales constituting the measure of the disputed use tax collection liability. The Due Process Clause and Commerce Clause tests described by this Court do not impose such a relational requirement but rather look to whether the State has given anything for which it can ask return. *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444 (1940). The Society's maintenance of the California advertising soliciting offices satisfies this test.

The decision of this Court in *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967), does not set forth a requirement that a relationship exist between the local activity and the transaction taxed. The lack of nexus

condemned in that case could be cured without imposing such a relational requirement. The *National Bellas Hess* Court invalidated the tax based upon the total absence of any local activities other than the use of common carrier and the U. S. mail. This defect is cured by requiring that the foreign retailer have additional physical presence in the taxing jurisdiction; to further require that that physical presence be interrelated with the transaction taxed would be illogical and unnecessarily restrictive of the state's taxing power.

The Court in *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359 (1941) and *Nelson v. Montgomery Ward*, 312 U. S. 373 (1941), in upholding the constitutionality of requiring mail order retailers with separate retail outlets within the taxing jurisdiction to collect use taxes, held that the absence of a relationship between a foreign retailer's local activities and the transaction taxed was immaterial.

The "dissociation" test set out in *American Oil Co. v. Neill*, 380 U.S. 451 (1965) and *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951), requires that a relationship exist between the transaction taxed and the taxing jurisdiction in those instances where the legal incidence of the tax imposed falls on the foreign retailers. As the instant case involves a use tax collection requirement, the legal incidence of which falls upon the California user, the "dissociation" test is inapplicable because the relationship between the taxable transaction (the local use) and the taxing jurisdiction is self evident.

The decision of *Miller Bros. v. Maryland*, 347 U.S. 340 (1954) is inapposite to the resolution of the instant controversy. It turned upon a defect in the relationship between the foreign retailer and the transaction taxed. Residents of the taxing jurisdiction purchased items over

the counter from border stores in foreign states. The Court struck down the use tax collection liability on those sales because it was uncertain whether the purchasers actually returned to the taxing jurisdiction to use the items purchased. No such defect is present in the instant case.

Finally, even if a relationship between the Society's local activities and the transaction taxed were required, it could be found on the facts of this case.

First of all, the Society sold over-the-counter merchandise in California which was identical to that sold by mail order during a portion of the period here in controversy, thus putting this case on all fours with the *Sears Roebuck* case.

Secondly, the Society solicited advertising in California which supported the Magazine: the basic vehicle whereby the Society advertised its mail order sales and the source of its mail order mailing list. Moreover, the prestige of the Society, largely established by the Magazine, enhanced the saleability of the mail order maps, atlases, globes and books. Finally, both the Society's California activities and its mail order sales enhanced its basic corporate purpose of increasing and diffusing geographic knowledge.

ARGUMENT

I. The Use Tax Collection Liability in Question Was Imposed in Conformance with California Law.

We are here concerned with the California use tax which is complemental to the California sales tax or tangible personal property. See Sections 6051, 6203 and 6401 of the Revenue and Taxation Code.[5] Section 6203 requires every "retailer engaged in business in this state and making sales

5. All references to statutory sections hereinafter made shall be to the California Revenue and Taxation Code unless expressly noted otherwise.

of tangible personal property for storage, use or other consumption in this state" to collect use taxes from the purchaser. Section 6204 provides that the retailer is indebted to the state for any taxes which it is required to collect. The retailer becomes so indebted regardless of whether or not the use tax is collected. If the use tax is not collected, the retailer is liable for default in the performance of its duty as a collection agent for the state. *Bank of America v. State Bd. of Equal.*, 209 Cal.App. 2d 780, 793; 26 Cal.Rptr. 348, 355 (1962).

The Society's activities in California bring it within the coverage of section 6203 and therefore place it under a duty to collect use taxes upon the sales in question. Section 6203 expressly provides that the phrase "retailer engaged in business in this state" as used therein includes (among other descriptions not relevant to the instant controversy) "[a]ny retailer maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business". The maintenance by the Society of two offices within California therefore establishes it to be such a "retailer engaged in business in this state". The California Supreme Court, in upholding the use tax collection liability below, plainly so held. 16 Cal.3d 637, 642; 547 P.2d 458, 460-461.

Moreover, the imposition of a use tax collection liability measured by the Society's total sales to Californians best fulfills the purposes of the use tax law as well. The basic purpose of the use tax law is to provide for competitive parity by charging foreign retailers doing business in California with a use tax collection liability equivalent to the sales tax paid by competing local retailers.

A more complete description of this purpose is detailed in an article entitled *the California Use Tax,* 24 Cal. L. Rev. 175, by Roger Traynor, former Chief Justice of the California Supreme Court. It is initially observed therein that the operation of a local sales tax without a complemental use tax penalizes local retailers by permitting foreign competitors to undercut their prices by selling ex tax. The author therefore preliminarily concludes:

> "If the state sales taxation is to continue, states must find some way of equalizing the competition which now threatens their sources of revenue as it threatens their local businesses." *Id.* at 175.

This equalization is found in the complemental use tax law; however, the use tax alone could not equalize the competition because:

> "Any attempt to collect a use tax from countless individual users of commodities would involve so much supervision and expense as to vitiate the exercise of a state's jurisdiction over them. The users might have a clear responsibility for tax payment, but they might evade it by virtue of their numbers." *Id.* at 181.

Accordingly, the use tax collection liability is necessary.

This Court has recognized the validity of this purpose in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1936), wherein it said of the Washington use tax law:

> "The practical effect of a system thus conditioned is readily perceived. *One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states* who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of drain upon the revenue of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales." (Emphasis added.) *Id.* at 581.

For purposes of the instant action, the Society is such a foreign retailer[6] who, absent the imposition of a use tax collection liability, would enjoy a competitive advantage over local retailers by being able to offer lower prices selling ex tax. Imposition of this liability thus comports with the spirit, as well as the letter, of the California use tax law.

II. The California Activities of the Society Satisfy the Requirements of the Due Process Clause and Commerce Clause.

A. THE SOCIETY'S CALIFORNIA ACTIVITIES SUPPORT THE CONSTITUTIONAL IMPOSITION OF THE CHALLENGED USE TAX COLLECTION LIABILITY, REGARDLESS OF WHETHER OR NOT THESE ACTIVITIES WERE RELATED TO THE TRANSACTIONS TAXED.

1. The Due Process Clause and Commerce Clause Tests Have Never Been Described by This Court as Requiring a Relationship Between the Local Activity and the Transaction Taxed.

The Due Process Clause and the Commerce Clause are closely related insofar as similar standards have been applied by the courts to determine whether state tax laws are constitutional thereunder. *National Bellas Hess v. Dept. of Revenue, supra,* 386 U.S. 753, 756 (1967). These standards are incorporated into a test of nexus or minimum contact between the taxpayer and the taxing jurisdiction which is necessary to support a finding that the tax is constitutionally imposed. Although the test has been variously

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6. The Society's character as a non profit, scientific and educational organization, however commendable, is here irrelevant because this case will stand as precedent governing the treatment accorded all out-of-state retailers similarly situated, whether or not they possess the non profit character of the Society. They will, in the main, be comprised of profit making retailers eager to escape the requirement of collecting use taxes in order to gain a competitive pricing advantage over local retailers.

stated, an oft quoted definition of what constitutes nexus is set forth in *Wisconsin v. J. C. Penny Co., supra,* 311 U.S. 435, 444 (1940), wherein this Court noted:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return." *Id.* at 444.

This definition does not engraft the requirement of a relationship between the local contact and the transaction taxed. The requisite "fiscal relation" is established by the fact that the foreign retailer has entered the state and benefitted as a result. In the instant case, for example, it can be readily seen that the Society has secured substantial benefits from its activities within California over and above those associated with its mail order business. By virtue of the protection conferred by this State, the Society has been able to establish and maintain employee staffed offices in San Francisco and Beverly Hills from which to solicit advertising revenues for the Magazine. In this regard it is noteworthy that the Society has since doubled its salesmen and secretaries in both California offices. Further, the very opportunity of having a market of potential advertisers in California from whom to solicit business is a benefit conferred by the state insofar as its laws protects them and permits their continued existence. The net result of these activities is obviously beneficial insofar as it provides the Society with advertising dollars from California businesses.

Certainly the above benefits justify requiring the Society to collect a use tax on its mail order sales to Californians whether or not a relationship exists between the local activity and the transaction taxed. It is asking the Society no more than to bear a fair share of the cost of local government.

2. The National Bellas Hess Case Does Not Require a Relationship Between the Local Activity and the Transaction Taxed.

This Court in *National Bellas Hess v. Department of Revenue, supra,* 386 U.S. 753 (1967) held that a use tax collection liability could not be imposed upon an out-of-state mail order retailer whose only contracts with the taxing jurisdiction were through the use of common carriers or the U.S. mail. In so holding, the Court noted that to conclude otherwise would be to:

> ". . . repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or *property within a State,* and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." (Emphasis added.) 386 U.S. 753, 758.

It is evident from the above quoted material that a mail order seller with property within a state would be subject to taxation upon its mail order sales to the residents of that state. The Society's maintenance of two offices in this state easily qualifies it as a seller with property in California. The Court did not set out a requirement that the property owned bear any relationship to the transaction taxed. On the contrary, the overall import of the *National Bellas Hess* case is that where there is exploitation of the local market by mail order sales, any physical contacts between the retailer and the taxing jurisdiction above and beyond contact "by common carrier or the United States mail" would support the imposition of a use tax collection liability measured by the mail order sales.

The Society contends that under the rule of *National Bellas Hess,* a foreign retailer must have independent in-state contacts with the *customers* of the mail order sales before he can constitutionally be required to collect a use tax with regard thereto. Brief for Appellant, p. 28. The only language in the opinion which the Society cites in support of this contention is the sentence quoted at page 28 of the Brief for Appellant wherein the Court noted that it has never upheld the imposition of a use tax collection liability on a retailer "whose only connection with customers" in the taxing jurisdiction is by common carrier or the United States mail. 386 U.S. at 758. To construe this sentence in the manner urged by the Society would be to render the opinion internally inconsistent; moreover, it would impute to the *National Bellas Hess* court the intent to overrule *sub silentio Nelson v. Sears Roebuck & Co.* (1941), 312 U.S. 359, and *Nelson v. Montgomery Ward and Co.* (1941), 312 U.S. 373, despite the fact that it earlier cites both cases with apparent approval. 386 U.S. at 757.

The opinion, as so construed, would be rendered internally inconsistent because such a relational requirement would not square with the Court's recognition, earlier noted, that mere ownership of property within the taxing jurisdiction without more would support the imposition of a use tax collection liability. The opinion, as so construed, would overrule *Sears Roebuck* and *Montgomery Ward* because these cases held, as will be discussed in more detail *infra,* that the absence of a relationship between the foreign retailer's local activities and the mail order business taxed was irrelevant.

In addition to the foregoing, it is plain upon a review of the basis of the Court's holding in the *National Bellas Hess* case that the constitutional defects it condemned could be

cured without requiring that a relationship exist between the retailer's local activities and the transaction taxed. As noted above, the Court in *National Bellas Hess* considered objections raised under both the Due Process Clause and the Commerce Clause. These two sources of objection will be discussed separately in this regard.

The Due Process Clause requires that some benefit be conferred by the taxing jurisdiction for which a return could be asked. *Wisconsin v. J. C. Penny Co., supra,* 311 U.S. 435, 444 (1940). On the facts of the *National Bellas Hess* case, it is clear that the foreign retailer benefitted insofar as it had customers in the taxing jurisdiction whose continued existence was dependent upon the protection afforded them by that state. Therefore, if the Court had held due process requirements satisfied under those facts, the decision would have been logically consistent with the fairness requirements underlying concept of due process. Indeed, in the related area of in personam jurisdiction over foreign entities, the Court did so hold. In *McGee v. International Life Ins. Co.,* 355 U.S. 120 (1957), in personam jurisdiction was upheld upon the basis of a commercial exploitation of the forum state despite the absence of an physical presence therein by the foreign corporation sued. This state of affairs has prompted at least one commentator to speculate that "[i]n light of the striking similarity between jurisdiction for the purpose of taxation and jurisdiction for the purpose of exercising judicial power,[7] the court in *Bellas Hess* could easily have adopted the economic exploitation test in lieu

7. The author noted that the due process tests in the areas of taxation and in personam jurisdiction are very similar, citing *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.,* 239 F.2d 502 (4th Cir. 1956) and *International Shoe Co. v. Washington,* 326 U.S. 310, 321 (1945). 20 Case Western Reserve Law Review 597, 605-606, fn. 42.

of the archaic and artificial standard demanding physical nexus." 20 Case Western Reserve Law Review 597, 605-606, fn. 42. While the Court in *National Bellas Hess* indicated the need for a physical presence over and above this mail order economic exploitation, it would be unduly restrictive to the state's taxing power to further require that it be related to any particular transaction. It should be enough that the foreign retailer receives some form of protection, opportunity or benefits, independent of the mail order exploitation, for which the state can ask return. As noted previously, the Society has so benefitted from its California activities.

With regard to the Commerce Clause, the opinion of the Court in *National Bellas Hess* turned upon the administrative entanglements which the majority felt would unduly burden interstate mail order businesses if every state, municipality, school district and other political subdivisions were allowed to impose sales and use taxes at varying rates with varying administrative and record keeping requirements. 386 U.S. 753, 759-760. In keeping with the above, it is unnecessary to construe *National Bellas Hess* as requiring that a retailer's local activities be related to the taxable transaction. All that is needed to cure the defect found in that case is the requirement of a voluntary physical presence, independent of mail order sales, as a condition precedent to taxability. Thus, permitting use tax collection liabilities to be imposed with regard to mail order sales of foreign retailers who have voluntarily entered the taxing jurisdiction and established a business office will not result in the administrative entanglement condemned in *National Bellas Hess*. The number of taxing jurisdictions in which the typical mail order retailer has business offices

will doubtless be small;[8] moreover, the mail order retailer would be able to control his susceptability to such taxation by choosing selectively where he would maintain such offices.

It is appropriate to mention at this point that all of the bills recently introduced in Congress which relate to the imposition of a jurisdictional standard for state sales and use taxation of interstate commerce provide that a person may constitutionally be subjected to a use tax collection liability if that person owns or leases real property within the state without limitation as to whether said ownership or leasing was related to the transaction taxed.[9] This is especially noteworthy in light of the fact that most of these bills proposed general cutbacks in the power of the states to impose use tax collection liabilities upon foreign retailers under other circumstances such as those held taxable in *Scripto v. Carson,* 362 U.S. 207 (1961), thus reflecting the belief that, at least with regard to leasing or ownership of property, a foreign retailer's local activities within the taxing jurisdiction clearly subject it to tax despite the lack of any relationship to the transaction taxed. Because, as noted in *National Bellas Hess,* the Congress is vested with the power of regulation and control under the Commerce Clause. (386 U.S. 753, 760), this belief upon the part of all its members introducing such bills is significant.

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8. Indeed, Amicus Curiae Direct Mail/Marketing Association, Inc., whose only argument not advanced by the Society is that administrative entanglements would result from an affirmance herein, concedes that "[t]he overwhelming majority [of firms engaged in interstate commerce] have places of business in only one state." Brief Amicus Curiae on Behalf of Direct Mail/Marketing Association, Inc. Urging Reversal, page 3.

9. 89th Congress: H.R. 11798, H.R. 16491; 90th Congress: H.R. 2158; 91st Congress: H.R. 2179, H.R. 3835, H.R. 4178, H.R. 7906, S. 611, S. 916, S. 2804; 92d Congress: H.R. 1538, H.R. 4267, S. 317, S. 1210; 93d Congress: H.R. 977, H.R. 1453, S. 282, S. 1245, S. 1982, S. 2811; 94th Congress: H.R. 9, S. 28.

3. The Sears Roebuck and Montgomery Ward Cases Hold That No Relationship Need Exist Between the Local Activity and the Transaction Taxed.

In *Nelson v. Sears, Roebuck & Co., supra,* 312 U.S. 359 (1940), this Court upheld the imposition of an Iowa use tax collection liability measured by mail order sales of an out-of-state retailer with Iowa retail outlets. The retailer there advanced the argument that the disputed mail order sales were unrelated to the presence of its retail outlets in Iowa. The use tax collection liability was upheld despite this argument. The Court noted that Iowa, by virtue of the retailer's contacts with it, was entitled to tax the retailer's entire Iowa business. Thus, it noted:

> "Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts." 312 U.S. 359, 364.

The clear implication of the court's observations in this regard is that a direct relationship between the retailer's local activities and the mail order sales constituting the measure of the use tax collection liability need not be proven.[10] Moreover, this of necessity had to be so, for otherwise the Court could not have upheld the use tax collection liability without observing that there had been satis-

10. The Society suggests that the court's decision turned upon its finding of a factual inter-relationship between the local retail outlets and the mail order sales. Brief of Appellant, page 17. The language quoted above that Iowa may "assume" such activities "not unrelated" dispels such a conclusion. Moreover, as noted, *infra,* the Court in *Nelson v. Montgomery Ward, supra,* 312 U.S. 373 (1941) expressly declares irrelevant evidence pointing to the absence of such a relationship.

factory proof of the existence of such a relationship. The mere fact of over-the-counter sales at Sears' retail outlets in Iowa cities cannot realistically be said to constitute proof of a relationship to the catalogue mail order sales to residents of the outlying rural areas of Iowa.

In the related case of *Nelson v. Montgomery Ward, supra,* 312 U.S. 373 (1941), in passing upon the same issue, this Court found testimony relating to the absence of a relationship between the retailer's local activities and the taxable transaction was "immaterial". 312 U.S. at 375. The *Montgomery Ward* case has accordingly been cited in support of the proposition that the local activities of a foreign retailer need not have a causal relation to the sales in which the tax is levied. 81 Harvard L. Rev. 69, 215, fn. 14.

4. The "Dissociation" Test Applicable in Measuring the Validity of Excise Taxes the Incidence of Which Falls Upon Foreign Retailers Is Inapposite to the Resolution of the Instant Controversy.

The Society alludes repeatedly in its brief to the "dissociation" test set forth in *American Oil Co. v. Neill, supra,* 380 U.S. 451 (1964) and *Norton Co. v. Department of Revenue, supra,* 340 U.S. 534 (1951). In relying upon these cases, the Society refuses to come to grips with the fact that the excise taxes there involved fell upon the foreign retailers whereas the use tax involved in the instant case falls upon the local California purchaser. This difference is crucial insofar as different standards of nexus are applied with regard to testing the validity of taxes falling on the foreign retailer.

As touched upon previously, the California use tax has its incidence upon the California purchasers who store, use or consume the products purchased from foreign retailers. See *Bank of America v. State Bd. of Equal., supra,* 209 Cal.App.2d 780, 793 (1962); 26 Cal.Rptr. 348. The

foreign retailer is liable only for his default in the performance of his duty as collection agent of this tax under California Revenue and Taxation Code section 6203. *Id.* at 799.

The significance of the distinction between a use tax collection liability, where the incidence of the tax is on the local purchaser, and liability for an excise tax imposed directly upon the out-of-state retailer itself was recognized by this Court in *Norton Co. v. Dept. of Revenue, supra,* 340 U.S. 534 (1951), where, in passing upon the constitutionality of a gross receipts tax imposed upon a nonresident retailer, it declared inapposite cases involving the collection of taxes attributable to the local buyer observing that a state imposing use taxes can more easily meet the burden of demonstrating sufficient nexus to support the tax because the impact of those taxes is on the local buyer or user. In that regard, the Court said:

> "Where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable. *McLeod v. Dilworth Co.*, 322 U.S. 327. Of course, *a state imposing a sales*[11] *or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer*

11. The reference to a "sales" tax at this point is explained by the fact that some states have sales taxes the incidence of which falls upon the *consumer* rather than the vendor. See State and Local Taxation, John F. Due (1971), pp. 24-26. Illinois (at the time of the *Norton* decision) had a sales tax the incidence of which was on the vendor and therefore the court was holding inapplicable decisions involving consumer type sales taxes and use tax collection liabilities such as are present in this case.

> *or user. Cases involving them are not controlling here, for this tax falls on the vendor.*" (Emphasis added.) 340 U.S. at 537.[12]

This distinction is justified because the local buyer or user has obvious contacts with the taxing jurisdiction, therefore a tax whose incidence falls upon such buyers or users is more easily sustainable. This is a difference in substance and not merely form. In *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), the Court noted:

> ". . . we are not dealing with matters of nomenclature even though they be matters of nicety. 'The state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the Federal Constitution, neither can it render unconstitutional a tax, that in its actual effect violates no constitutional provision, by inaccurately defining it.' *Wagner v. City of Covington,* 251 U.S. 95, 102. Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331.[13]

Perhaps the best illustration of the effect of this distinction is a comparison of the *McLeod* case and *General Trad-*

12. The Society contends that the Court's distinction of use tax collection cases in *Norton* does not signify that the dissociation test is wholly inapplicable to them but rather that it applies in such cases in a different degree. Brief of Appellant, pages 32-33. This is illogical. The dissociation test applies with regard to taxes falling on foreign retailers because its purpose is to determine whether the transaction taxed (the foreign retailers' sales) bears a sufficient relationship to the taxing jurisdiction to bring it within the latter's taxing power. In direct contrast, where use tax collection liabilities are involved, there is no question that the taxable transaction (the local use) is within taxing power of the state in question; therefore the dissociation test would serve no useful function.

13. This observation directly refutes the Society's assertion that there is no distinction between taxes the incidence of which fall on the foreign retailer and use tax collection liabilities because "[t]he impact of a sales tax, an excise tax, or a use tax, is identical." Brief of Appellant, page 31.

ing Co. v. Tax Comm'n, 322 U.S. 335 (1944). These two cases were argued and decided on the same dates and presented virtually identical facts save and except that *McLeod* involved a sales tax upon an out-of-state retailer and *General Trading Co.* involved a use tax collection liability imposed upon an out-of-state retailer. In both cases the out-of-state corporations were not qualified to do business in the taxing state and had no office or place of business there but did solicit orders from its residents by travelling salesmen. In the *McLeod* case, the sales tax was held unconstitutional; in the *General Trading Co.* case, the use tax collection liability was upheld. The dissents in both cases make it apparent that the majority reached different results in the two cases solely because of the nature of the tax imposed.

Similarly, *McLeod* also can be contrasted with *Scripto v. Carson,* 362 U.S. 207 (1960), where on comparable facts, the Court upheld the constitutionality of a use tax collection liability imposed upon the nonresident retailer. The facts of these two cases were recognized as indistinguishable in 81 Harv.L.Rev. 69, 216.

Just as the *Norton* case has been shown to be inapplicable to the instant controversy, so is the case of *American Oil Co. v. Neill, supra,* 380 U.S. 451 (1964). In that case, an Idaho State Tax Collector imposed an excise tax on an out-of-state motor fuel dealer. *Id.* at 454, 455. The court expressly adopted the findings of the trial judge that the incidence of the tax was on the dealer not the local user. *Id.* at 456-457.

5. The Decision of This Court in Miller Bros. v. Maryland, 347 U.S. 340 (1954) Is Inapposite to the Resolution of the Instant Controversy.

The Society makes reference to the decision of this Court in *Miller Bros. Co. v. Maryland, supra,* 347 U.S. 340 (1954). As is shown below, the *Miller Bros.* case is not germane to

the question here presented because the Court's finding of insufficient nexus in that case turned upon defects not present in the instant case.

In *Miller Bros. v. Maryland, supra,* 347 U.S. 340 (1954), the Court invalidated a Maryland use tax collection liability imposed with regard to the sales of merchandise by a Delaware corporation from its Delaware store to visting Maryland customers. The merchandise purchased from the Delaware store was either handed to the customer over-the-counter or delivered to the customer's Maryland address by common carrier or the vendor's vehicle. The Court, in holding the Maryland use tax collection requirement unconstitutional, noted that it was uncertain as to whether merchandise sold over-the-counter was actually transported to Maryland prior to use. 347 U.S. 340, 344.

It is clear from the above that the Court's holding in *Miller Bros.* turned upon a defect in the relationship between the foreign retailer and the transaction taxed which is not present in the instant case. This defect was aptly described by the California Supreme Court in this case as follows:

> "The court in denying tax liability noted that no one was liable for a use tax until the merchandise was imported into the taxing state. When there is an over-the-counter out-of-state sale, the taxable event, use occurs only after the sale is complete; the seller has no control over that use. When discussing *Miller Bros.* in *Scripto v. Carson,* supra, 362 U.S. 207, 212 [4 L.Ed. 2d 660, 664-665], the Supreme Court declared that it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland. The use in the taxing state must be certain from the retailer's own actions and not just known to him from other factors. Knowledge is an insufficient connection

to uphold a tax against attack under the due process clause. (*American Oil Co. v. Neill, supra,* 380 U.S. 451, 457 [14 L.Ed 2d 1, 6].)" 16 Cal. 3d 637, 649-650; 128 Cal. Rptr. 682, 690.

In direct contrast, the Society in the instant case shipped all purchases directly to its California customers inside California; hence no uncertainty or gaps intervene between the Society's mail order sales and the California purchaser's subsequent use.

In addition to the foregoing, *Miller Bros.* may be distinguished from the instant case in that as the foreign retailer in that case did not directly exploit the market of the taxing State. Thus, the Court in *Miller Bros.* emphasized that the Delaware based foreign retailer did not engage in solicitation in Maryland, the taxing jurisdiction, "other than the incidental effects of general advertising" in Delaware and that there had been "no invasion or exploitation of the consumer market in Maryland", thereby recognizing the *incidental* nature of the solicitation of the Marylanders there involved. 347 U.S. 340, 347. Stated in another way, the Delaware store did not direct an advertising campaign specificially against the residents of Maryland; rather, its general advertising directed to potential customers in the vicinity of the store spilled over into Maryland as well as reaching residents of Delaware. Further, the purchasers did not deal with the store from their residences but had to leave Maryland and visit the store in Delaware. This situation prompted this Court in *Scripto v. Carson, supra,* 362 U.S. 207 (1960), to characterize the facts of *Miller Bros.* as follows:

> "True, there was an 'occasional' delivery of such purchases by Miller into Maryland, and it did occasionally mail notices of special sales to former customers; but *Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales.*" (Emphasis added.) 362 U.S. 207, 212.

All of the above described factors, which led the Court in *Miller Bros.* to find that there had been no exploitation of the Maryland market, are absent in the instant case. The Society specifically directed its advertising campaign for the sales of maps, atlases, globes and books against its California subscribers. This solicitation was continuous in the form of repeated advertisements in the Magazine and mailed announcements sent throughout all periods relevant hereto. Finally, the Society did not wait for these California residents to come to its out-of-state stores, but enclosed with the advertisements mail order coupons which were completed and sent directly to the Society. It is clear that under the rationale of the *Miller Bros.* case the Society has exploited the California market.

For all the foregoing reasons, the *Miller Bros.* case is inapposite.[14]

B. IN ANY EVENT, THE SOCIETY'S CALIFORNIA ACTIVITIES ARE NOT UNRELATED TO THE TRANSACTION TAXED.

It has been shown in the preceding section of this brief that the tests of the Due Process Clause and Commerce Clause do not require that there be a relationship between

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14. The case of *Montgomery Ward & Co. v. Bd. of Equalization,* 272 Cal.App.2d 728 (1969), 78 Cal.Rptr. 373, cert. den. 396 U.S. 1040, cited by Society can be distinguished on the same grounds as *Miller Bros.* insofar as it involved a California use tax collection liability imposed with regard to over-the-counter sales of goods by an out-of-state retailer from its Reno, Nevada and Klamath Falls, Oregon stores to customers with California addresses. As the California Supreme Court below noted, the constitutional defect in the *Montgomery Ward* case "lay in the lack of certainty between the seller's activities and the event to be taxed, namely the use". 16 Cal. 3d 637, 649; 128 Cal.Rptr. 682, 690.

the local activities of a foreign retailer and the transaction taxed. Nevertheless, assuming for the sake of argument that such a relationship were required, it is clear that it is present in the instant case.

This is perhaps made most apparent when the instant case is compared with *Nelson v. Sears Roebuck & Co., supra,* 312 U.S. 359 (1941). The two cases are virtually identical insofar as both involved foreign retailers who sold over-the-counter from local offices items which were identical to those sold by mail order. Thus, if the *Sears Roebuck* case is construed as requiring that the local activities be related to the mail order sales, then it must be concluded that this test was met in the instant case as it was there. The Society argues that its California sales were too insubstantial to parallel the *Sears Roebuck* case. Though the Society's California over-the-counter sales were modest and only effected during a portion of the period in controversy, they nevertheless constituted a course of retail sales of items similar to those sold by mail order which California could rightly assume were "not unrelated." To say that such a conclusion would not conform to practical reality because such a modest level of over-the-counter sales could not appreciably influence mail order sales is no different than to say that *Sears Roebuck* was wrongly decided because the over-the-counter sales from Sears' urban retail outlets obviously did not affect catalogue mail order sales to outlying rural areas of Iowa. As the latter argument apparently proved unpersuasive, the former argument should similarly be cast aside.

Moreover, the Society's other California contacts separate and apart from its local over-the-counter sales bear a stronger relationship to the mail order sales than those before the Court in *Sears Roebuck*. In *Sears Roebuck*, the

existence of the retail outlets in Iowa must be said to contribute to some unknown extent to the generation of mail order sales. In the instant case, the Society's California based employee-staffed offices were related to the mail order sales here in controversy, by virtue of the following facts:

(1) The Society's California solicitation of advertisements from those offices provided revenues which enured to the Magazine;

(2) The Magazine served as the basic vehicle through which the advertisements of the maps, atlases, globes and books in question were communicated to the Society's California customers;

(3) The membership of the National Geographic Society provided the mailing list of California residents to whom the Society sent its flyers;

(4) The prestige and goodwill of the Magazine carried over to products sold under the Society's name.

It is thus submitted that if, indeed, a relationship between the local activities and the transaction taxed was required at all by the *Sears Roebuck* Court, it is satisfied in the instant case as it was in that case.

The Society attempted below to distinguish the holding in *Sears Roebuck* upon the ground that the foreign retailer in that case was qualified to do business within the taxing jurisdiction. In that regard, the Society has gone outside the proven record before this Court and asserted that it was not similarly qualified to do business in California. Brief for Appellant, page 10. This suggestion conflicts with the record insofar it is stipulated that the Society did sell tangible personal property in California at the start of the period in controversy and therefore, pursuant to the presumption that things are lawfully done,[15] it must be pre-

15. *McFarland v. Campbell,* 213 F.2d 855, 858 (1954).

sumed that the Society complied with California Revenue and Taxation Code section 6066 and secured a seller's permit. Moreover, even if it were assumed that the Society did not seek a seller's permit, it shoud nevertheless be estopped to deny the lack of having qualified to do business in California in light of its stipulated admission that it did in fact do business in this state; otherwise, a business violating the law would enjoy an advantage over the law abiding business which had secured a seller's permit.

Furthermore, the result reached in *Sears Roebuck* should not have been otherwise if the retailer in that case had not been registered to do business within that state. Although the Court there speculated hypothetically that the lack of qualification to do business within the taxing jurisdiction might result in an inability to tax occasioned by the impotence of state power, it went on to find that the taxpayer's local activities in the taxing jurisdiction supported taxation of its mail order business. 312 U.S. 359, 364. Thus the Court recognized that the presence or absence of qualification to do business within the taxing jurisdiction was superfluous to the conclusion it reached on the facts before it. Moreover, this Court has easily found sufficient nexus to support the imposition of a use tax collection liability against foreign corporations in other cases before it despite the fact that the corporation was not licensed to do business in the taxing state. *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *General Trading Co. v. Tax Comm'n.*, 322 U.S. 335 (1944). It follows that the Society's arguments in this regard shoud be dismissed as irrelevant.

Finally, a relationship between the Society's California activities and the disputed mail order sales can be said to exist insofar as both activities further the basic objective of the Society: the increase and diffusion of geographic

knowledge. (A 42). As noted in our Motion to Dismiss or Affirm, the California Supreme Court held below that under *Sears Roebuck* it must be established that the Society's activities were not unrelated to the mail order sales constituting the measure of the tax. Moreover, that court declined to consider as unnecessary to its decision the Society's California over-the-counter sales. Nevertheless, it found a sufficient relationship in the fact that both the Magazine, for which the Society solicits advertising in California, and the maps, atlases, globes and books which were sold by mail order are similar in nature and serve the basic corporate purpose described above. 16 Cal. 3d 637, 647; 128 Cal. Rptr. 682, 688. While the Board does not accept the conclusion of the California Supreme Court that such a relationship need be found, it agrees with its conclusion that one exists on the facts of this case.

III. The Other Contentions Advanced by the Society Are Without Merit.

Although it has been shown in the preceding section of this brief that the Society's basic contentions are without merit, certain points raised by the Society in its brief have not previously been touched upon and will be dealt with below.

The Society argues that the imposition of a use tax collection liability upon a foreign retailer cannot be upheld in the absence of an in-state, "sales-related activity". Brief of Appellant, pages 14-20. This argument does not square with the fairness concept underlying the nexus requirement. As discussed earlier, a foreign retailer substantially benefits from the states in which it does a mail order business insofar as the protection afforded by the state insures the continued existence of its customers. While additional con-

tacts have been held necessary, it is neither fair nor logical to further impose a relational requirement between those contacts and the mail order sales. Obviously, a foreign retailer can enjoy the benefit of the protection of local government in the conduct of activities other than sales-related activities as, for example, the Society has in the instant case.

That this Court has not required that the local activity be sales-related is manifest in the recent decision of *Standard Steel Co. v. Wash. Revenue Dept.*, 419 U.S. 560 (1975). The Court there upheld the constitutionality of an unapportioned gross receipts tax imposed upon the mail order sales by a foreign retailer to Boeing. *Id.* at 561. The only local activity was a Washington based engineer whose primary duty was to consult with Boeing regarding its anticipated needs and to follow up on any difficulties in the use of the products after delivery. *Id.* He did not solicit orders or otherwise involve himself in the mail order sales. *Id.* Although this local activity only indirectly resembled a sales-related activity, the Court found that it so strongly supported a finding of nexus that it characterized the taxpayer's contentions to the contrary as verging "on the frivolous." *Id.* at 562.

The Society also raises a false spectre by suggesting that unless this Court require a local sales-related activity as a condition precedent to the state's power to require the collection of use taxes, any contact, be it a one-time photographic expedition or contractual arrangements with a scientist having a California address, would result in taxability. Brief of Appellant, pages 26-27. This, of course, does not follow. To say that the continuous maintenance of employee-staffed business offices in the taxing jurisdiction supports a finding of nexus sufficient to uphold a requirement that use taxes be collected on mail order sales is not to say that any contact with the taxing jurisdiction, however meager or sporadic, would support a similar requirement.[16] On the other hand, if the Court adopts the Society's rigid requirement of a sales-related activity, it would mean that even if the Society had its headquarters offices, printing presses and magazine distribution offices in California, it could nevertheless sell its maps, atlases, globes and books, ex tax from its District of Columbia and Maryland offices. This would be patently unjust.

The Society alludes to the fact that the Magazine is exempt from tax. Brief of Appellant, page 17. This exemption is conferred as a matter of legislative grace under California Revenue and Taxation Code Section 6362 which exempts the gross receipts from the sale or use of periodicals and their components from sales and use taxation and is not germane to the resolution of the instant controversy.[17] Nevertheless, the Society makes reference to this statute thereby suggesting that it somehow compels this Court to disregard its California advertising soliciting activities in passing upon the question of whether sufficient nexus exists to support the disputed use tax collection liability. This suggestion is spurious.

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16. By way of example, the bills introduced in Congress on this subject itemized in footnote 9, *supra*, would uphold taxation in the former circumstances, but clearly not in the latter.

17. California Revenue and Taxation Code Section 6362 provides in relevant part as follows:

> "(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical."

In the first place, the periodical exemption contained in section 6362 does not relate to the Society's California advertising soliciting activities. The statute only addresses itself to the taxability of the sale or use of *tangible personal property*. In contrast, the Society's solicitation of advertising and subsequent sale of advertising space is a *service* as opposed to a transaction in tangible personal property. Therefore, section 6362 does not apply at all.

In the second place, even though the Society's California advertising soliciting activities are not subject to sales or use taxation, this circumstance would be irrelevant to the instant controversy in that it would not affect the determination of whether the Society had received any benefits from its California activities for which California can ask a return under the Federal Due Process and Commerce Clause. The California Supreme Court below noted this when it observed:

> "The existence of a nexus to tax an interstate transaction is a constitutional question. The only relevant considerations are the contacts between the taxing state and the person and event to be taxed. The fact that a state chooses not to tax when it could constitutionally do so does not in any way reduce these contacts with the state. The manner in which the state chooses to exercise the power does not affect the existence of the power." 16 Cal. 3d 637, 645, fn. 7; 128 Cal.Rptr. 682, 687, fn. 7.

This point was also made in *Reader's Digest Association v. Mahin*, 255 N.E.2d 458 (1970), cert. den. 399 U.S. 919. *Reader's Digest* involved many facts similar to the instant case. One such fact was that Reader's Digest Association published a monthly magazine exempt from taxation under the Illinois equivalent to California's periodical exemption. Despite this exemption, the court held that the presence of Reader's Digest Association's advertising solicitors within Illinois could be considered as one of two bases upon which it found sufficient nexus to uphold the taxation of its mail order sales of books and albums to Illinois residents in the face of constitutional objections. Thus, the court said:

> "Through its solicitors in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i.e., books and albums, sold to Illinois residents." 255 N.E. 2d 458, 460.

In light of the above, it is clear that section 6362 is irrelevant to the resolution of the instant controversy.

CONCLUSION

In light of the fairness concept underlying the Commerce Clause and Due Process Clause, it would be improper to do more than require that foreign retailers who are substantially exploiting a state's mail order market have some physical presence within that jurisdiction to become subject to a use tax collection requirement with regard to their mail order sales. To impose the further requirement that a relationship must exist between this physical presence and the mail order sales would needlessly sacrifice the states' taxing power and cripple its ability to protect its local retailers from an unfair competitive advantage thereby conferred upon foreign retailers who are free to sell ex tax.

Even were this not so, it is plain that the Society's California activities relate to the transaction taxed.

It is respectfully submitted that the judgment below be affirmed.

DATED: December 17, 1976.

Respectfully submitted,

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(Appendix Follows)

Appendix A

CALIFORNIA STATUTES INVOLVED

California Revenue and Taxation Code Section 6051:

For the privilege of selling tangible personal property at retail a tax is hereby imposed upon all retailers at the rate of 2½ percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail in this state on or after August 1, 1933, and to and including June 30, 1935, and at the rate of 3 percent thereafter, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

California Revenue and Taxation Code Section 6066:

Every person desiring to engage in or conduct business as a seller within this State shall file with the board an application for a permit for each place of business. Every application for a permit shall be made upon a form prescribed by the board and shall set forth the name under which the applicant transacts or intends to transact business, the location of his place or places of business, and such other information as the board may require. The application shall be signed by the owner if a natural person; in the case of an association or partnership, by a member or partner; in the case of a corporation, by an executive officer or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority.

California Revenue and Taxation Code Section 6203:

Except as provided by Section 6292 and 6293 every retailer engaged in business in this state and making sales

of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapters 3.5 or 4 of this part, shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

California Revenue and Taxation Code Section 6204:

The tax required to be collected by the retailer and any amount unreturned to the customer which is not tax but was collected from the customer under the representation by the retailer that it was tax constitutes debts owed by the retailer to this state.

California Revenue and Taxation Code Section 6362:

(a) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of tangible personal property which becomes an ingredient or component part of any newspaper or periodical regularly issued at average intervals not exceeding three months and any such newspaper or periodical.

(b) There are exempted from the taxes imposed by this part, the gross receipts from the sale of, and the storage, use, or other consumption in this state, of a photograph, whether or not produced to special order, when the possession, but not the title, of the photograph is transferred for the purpose of being reproduced one time only, in a newspaper regularly issued at the intervals set forth in subdivision (a) of this section.

California Revenue and Taxation Code Section 6401:

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which are required to be included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease.

FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

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West Publishing Company v. Superior Court of City and County of San Francisco, 128 P.2d 777, 20 Cal.2d 720 (1942), *cert. denied,* 317 U.S. 700 (1943) 2

Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940)..3, 4, 8

OTHER AUTHORITIES:

HOUSE COMM. ON THE JUDICIARY, REPORT OF THE SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE, H. R. Rep. No. 565, 89th Cong., 1st Sess. 883-84 (1965) 6, 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the Supreme Court of California

REPLY BRIEF OF APPELLANT

A review of the Appellee's brief leads us to address *ad seriatim* the specific points raised in those instances which appear pertinent. Those items not addressed are considered of no justiciable value in assisting the Court in reaching its decision in this case.

I. THE NATIONAL GEOGRAPHIC SOCIETY IS NOT A "RETAILER ENGAGED IN BUSINESS" IN CALIFORNIA

California Revenue and Taxation Code Section 6203 (Brief of Appellee, Appendix 1-2) states that only a "retailer engaged in business in California is required to collect a use tax on retail sales to California purchasers. Section 6203 further states that the phrase "retailer engaged in business" in California includes "[a]ny retailer maintaining . . . an office, place of distribution, sales or sample room or place, warehouse, or storage place or other place of business."

The Society is engaged in California in the solicitation of commercial advertising for its national Magazine, an activity which the Board admits (Brief of Appellee at 30, hereinafter "Br.App. ....") is not subject to California sales or use taxation. If Section 6203 required "every *person* engaged in business in [California]" to have a responsibility for use tax collection, then Section 6203 would apply to the Society, but the Section simply does not read that way. To interpret the phrase "retailer engaged in business" to include a retailer *not* engaged in retail business in California is to ignore the plain meaning of the statute. In *West Publishing Company* v. *Superior Court of City and County of San Francisco,* 128 P.2d 777, 20 Cal. 2d 720 (1942), *cert. denied,* 317 U.S. 700 (1943), the California Supreme Court held that a foreign law book publishing company maintained a place of business in the state for purposes of Section 6203 where it maintained large libraries in law offices in California, in return for the use of which its in-state salesmen were allotted office space, which it advertised as its local addresses; where in response to continuous solicitation of orders there was a regular flow of books

into California; and where its salesmen received initial installment payments, exercised a limited discretion in respect of collections on delinquent accounts, and frequently consummated sales to customers to whom unordered books were sent. Such activity was clearly "retail" in nature and thus within the meaning of Section 6203, as distinguished from the admittedly non-retail activity of the Society in California. Until Section 6203 is amended so as to include a *retailer engaged in non-retail business in California,* the non-retail in-state activity of the Society will fail to bring it within the ambit of such Section.

II. THE NON-RETAIL, IN-STATE, ACTIVITIES OF THE SOCIETY BEAR NO RELATIONSHIP TO ITS OUT-OF-STATE MAIL ORDER SALES AND CANNOT BE USED TO SUPPORT A USE TAX COLLECTION LIABILITY

The due process test for determining the permissible limits of state taxation has been set forth by this Court in *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435, 444 (1940):

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in *relation* to opportunities which it has given, to protection it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. (Emphasis added.)

As was stated by the California Court of Appeal in *Montgomery Ward & Co., Inc.* v. *State Board of Equalization,* 272 C.A. 2d 723, 78 Cal. Rptr. 373 (Ct. App. 1st Dist. 1969), *petition for hearing denied* (Sup. Ct. Calif., August 6, 1969), *cert. den.* 396 U.S. 1040 (1970),

> . . . the protection afforded and the benefits conferred must have some *relationship* to the transac-

> tion which the State seeks to burden. 78 Cal. Rptr. at p. 382. (Emphasis added.)

The relevant inquiry was aptly raised and then answered by the California Court of Appeal in the instant case (Jurisdictional Statement page 25a):

> What did the State of California give, in relation to the out-of-state sales, that the state can ask a return by way of requiring the Society to collect the use taxes? The answer is that the state provided no protections or benefits which were related to the . . . out-of-state sales. . . . all parts of the transactions were conducted through the federal mail, with the state playing no part and providing no benefits or protections.

As admitted by the Board (Br. App. 10), the only benefits afforded the Society by the state of California relate to the Society's advertising solicitation activities. Clearly, if California chose to impose a tax on those activities, the due process test set forth in *Wisconsin* v. *J. C. Penney Co., supra*, would be satisfied. The state of California, however, has chosen not to impose a tax on such activities, and its election to not so tax those activities does not entitle the state constitutionally, to tax, as a more convenient alternative, other totally unrelated, out-of-state activities of the Society for which the state of California has clearly given nothing for which it can ask return. The in-state activities of the Society vis-a-vis the Society's out-of-state mail order sales is discussed more fully, *infra*, Part VII.

III. NATIONAL BELLAS HESS REQUIRES IN-STATE RETAIL ACTIVITY BEFORE USE TAX COLLECTION LIABILITY MAY BE CONSTITUTIONALLY IMPOSED

The unmistakably clear line drawn by this Court in *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753 (1967), was that a state may not constitution-

ally impose a use tax collection liability on a foreign retailer which limits all of its retail, or customer, contacts to the United States mail or common carrier. The Court noted the "sharp distinction" between such foreign sellers who confine their activities to interstate instrumentalities, and those sellers which have "retail outlets, solicitors or property within a state." 386 U.S. at p. 758. The plain meaning of this quoted language is that the word "retail" modifies (1) outlets, (2) solicitors, and (3) property. The attempt by the Board (Br.App.11-13) to read this language as meaning "retail outlets, retail or *non-retail* solicitors, and retail or *non-retail* property" exceeds all limits of interpretative reasoning.

Additionally, reading *National Bellas Hess* as prohibiting "*any* physical contacts" (Br.App.11) between the state and the foreign seller would not only be contrary to the language quoted above, but would also be directly contrary to *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954), a case on which the Court in *Hess* placed considerable emphasis.

We repeat the key distinction drawn by this Court in *Hess*:

> . . . the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose *only connection with customers in the State* is by comon carrier or the United States mail. 386 U.S. at p. 758.

Contrary to the assertion of the Board (Br.App. 12) that this construction would render the *Hess* opinion "internally inconsistent" and would overrule *Nelson* v. *Sears, Roebuck & Co.*, 312 U.S. 359 (1941), the Court in *Hess* clearly contrasted a foreign seller which limited

its connection with customers to common carrier or the United States mail, with the situation existing in *Sears* where the seller had local *retail* outlets. See 386 U.S. at p. 758.

The misunderstanding of the Board as to what constitutes due process for taxing purposes is manifested at page 13 of the Brief for Appellee. The Board argues that, on the authority of *National Bellas Hess,* a state is providing a *benefit* to a foreign retailer within the meaning of the due process clause by reason of the protection afforded that state's resident customers. This suggestion borders on the absurd. What benefit does a foreign retailer derive from a state when it never enters the state on retail business? The answer is "none." A benefit is derived when a foreign retailer enters a state on retail business, travels through a state on retail business, maintains a place of retail business in a state, transacts retail business within a state and the like. None of the sales transactions involved in *Hess* were so conducted in-state, nor were the transactions in the instant case. This requirement of an *in-state* derivation of benefit for due process purposes was made eminently clear in *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359 (1941). The benefit conferred in that case was the extension to Sears by the state of Iowa of the privilege of being qualified to do business in Iowa, a matter that will be discussed *infra.*

On page 15 of its Brief, the Board refers to the bills that have been pending in the 89th through 94th Congresses, which would provide for a uniform system of interstate taxation. This legislation was drafted in response to the Report of the Special Subcommittee on State Taxation of Interstate Commerce, H.R. 565, issued June 30, 1965. Contrary to the suggestion of the Board, the Report makes clear that the Congress believes there must be *sales-related* activity by a foreign seller *within* a state before a use tax collection liability may be properly imposed.

In pertinent part, the Report states:

> It has been proposed that responsibility for collection of sales and use taxes be limited to firms with activity in a State in the nature of a "permanent establishment." This would include such installations as a plant, retail outlet, warehouse, or other originating point, but under some definitions, would exclude an office dealing exclusively with interstate sales. A solution of this nature would perhaps be the most conservative approach, in that it is very close to the situation as it exists in fact if not in law. While there are scattered instances of firms collecting tax for States where they have no such "permanent establishments," the proposed test would make no change in the present collection practices of most interstate sellers.
>
> This solution recognizes the unfairness of forcing an out-of-State seller not only to collect taxes imposed by another State upon its own people, but to submit to a whole series of local procedures and rules likely to be ill-designed for his business and at variance with the practice in other States where he is collecting tax. The "permanent establishment" rule has the effect of requiring collection only in cases where sales are being made in circumstances very similar to those of local companies and where an apparent tax advantage would be most resented. These are cases in which the out-of-State seller has localized his operation to a point where the full impact of local regulation may appropriately be applied and in which businessmen themselves generally seem prepared to recognize a tax-collection responsibility. A line drawn at this point would raise relatively few

> problems of interpretation or uncertainty. By accepting the prevailing practice, this solution would also alleviate the inequities suffered by those few companies collecting tax in more tenuous circumstances and would remove from others the cloud of contingent liability which now hangs over them. H.R. 565, pp. 883-884.

Under the Board's approach, a foreign mail-order seller could be held liable for a use tax collection liability on its mail-order sales into a state in which it owned a parking lot. The ownership of this parking lot would in no way be in furtherance of the mail-order sales, nor provide any sort of local customer identification which might attract or enhance local sales, yet, it would, in the opinion of the Board, be a sufficient in-state presence to support a use tax collection liability. Such a result would be clearly contrary to the due process requirements set forth in *Wisconsin* v. *J. C. Penney Co., supra.*

IV. NELSON v. SEARS, ROEBUCK & CO. REQUIRES (1) IN-STATE RETAIL ACTIVITY AND (2) IN-STATE QUALIFICATION TO DO BUSINESS IN ORDER TO REACH FOREIGN MAIL-ORDER SALES

In *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359 (1941), Sears, Roebuck & Co. had brought a suit to enjoin the state of Iowa from revoking Sears' authorization to do business as a foreign corporation in Iowa because of Sears' refusal to collect a use tax on its mail-order sales to Iowa residents. In its review of the case, this Court noted that as far as the *purchaser* of the mail-order sales was concerned, the validity of a use tax "has been withdrawn from the arena of debate." 312 U.S. at p. 363. (Citations omitted.) The "nub" of the controversy centered on the use of Sears,

Roebuck & Co., the *seller,* as the collection agent for such use taxes for Iowa. In response to Sears' argument that the mail-order sales in question were not related to Sears' in-state activity, the Court stated that while that point might be relevant if Sears were not qualified to do business in Iowa, since Iowa had extended to Sears that privilege, Iowa could exact a use tax collection liability on Sears' mail-order sales "as a price of enjoying the full benefits flowing from its Iowa business." 312 U.S. at p. 364. Moreover, the Court stated,

> Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to [Sears] course of business in Iowa. 312 U.S. at p. 364.

Additionally, with regard to Sears' argument that the imposition of a use tax collection liability would place it at a competitive disadvantage with other mail-order businesses, the Court responded,

> But those other concerns are not doing business in the state as foreign corporations. Hence, unlike [Sears], they are not receiving benefits from Iowa for which it has the power to exact a price. 312 U.S. at p. 365.

In short, the basis upon which Sears' use tax collection liability for its mail-order sales was upheld was its qualification to do business as a foreign corporation within the state of Iowa, a benefit clearly conferred upon Sears by Iowa, as opposed to the instant case, and a benefit for which Iowa could exact as a price use tax collection liability on Sears' mail-order sales. Thus, two critical elements present in *Sears* are lacking in the instant case: (1) Sears was attempting to depart-

mentalize its retail business between taxable local sales and non-taxable mail-order sales and (2) Sears was qualified to do business as a foreign corporation in-state. In no way can *Sears, Roebuck & Co.* be properly cited as support for the argument of the Board that California may impose a use tax collection liability on the Society for its mail-order sales to California purchasers.

V. THE "DISSOCIATION" TEST IS APPLICABLE IN ALL CASES WHERE A STATE SEEKS TO COLLECT A SALES-RELATED TAX FROM A SELLER

In analyzing a use tax case such as present herein, two questions must be asked. The first is whether a use tax may be imposed on a *purchaser* by reason of his in-state usage of an article purchased out of state, and second, whether the *seller* responsible for the out-of-state sale can be held liable for the collection of that use tax from the purchaser. As was seen in *Nelson* v. *Sears, Roebuck & Co., supra,* the first question is readily answerable, especially in the case of a resident mail-order purchaser. The more difficult inquiry is whether the seller has enough contacts with a taxing state to require him to collect and account for the applicable use tax. In *Scripto* v. *Carson,* 362 U.S. 207, 211 (1960), "continuous local solicitation" by in-state "salesmen" justified the imposition of a use tax collection liability; in *Nelson* v. *Sears, Roebuck & Co., supra,* twelve retail stores in-state *and* a qualification to do business in-state justified the imposition of a use tax collection liability. Twenty-four years after the *Sears, Roebuck* case, however, this Court held in *American Oil Company* v. *Neill,* 380 U.S. 451, 458 (1965), that, with respect to a seller's liability for sales-related tax, a company can "exempt itself by a *clear* showing that there are no in-state activities connected *with* out-of-state sales." (Emphasis added.)

The point that was made in our opening brief (pp. 29-33), to which the Board has simply closed its eyes (Br. App. 17-20) is that the principle of "dissociation" is applicable in all sales-related cases involving the liability of the *seller* for such taxes. While this principle of "dissociation" may be of no importance in determining the applicability of a use tax, it undeniably is of significant importance in weighing the validity of the imposition of a use tax collection liability on a *seller.* This Court clearly recognized the applicability of the "dissociation" test in all sales-related tax cases involving the liability of the *seller* in *American Oil Company* v. *Neill,* 380 U.S. 451 (1965), an excise tax case, by its citation of *Miller Bros. Co.* v. *Maryland, supra,* a use tax case, as controlling authority for the requirement that there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." 380 U.S. at p. 457.

VI. THE "SLIGHTEST PRESENCE" TEST FORMULATED BY THE CALIFORNIA SUPREME COURT IS IN CONFLICT WITH MILLER BROS. CO. v. MARYLAND

In *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340 (1954), this Court specifically rejected the imposition of a use tax collection liability by Maryland on a Delaware seller who was found to have some "presence" within Maryland. The case arose because Maryland seized one of Miller Bros.' trucks which was making deliveries to Maryland residents. The sales in question had been made to Maryland residents who had gone to Miller Bros.' Delaware store. During the taxable period July 1, 1947, through December 31, 1951, $2,500 of the purchases were carried back to Maryland by the purchasers, $1,500 in purchases were delivered to the purchasers' Maryland residences by common carrier, and

$8,000 in purchases were delivered to the purchasers' Maryland residences by a Miller Bros.' delivery truck. 347 U.S. at pp. 350-351. The Court phrased the question:

> . . . whether [Miller Bros.], by its acts or course of dealing, has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability. 347 U.S. at p. 344.

With the exception of the delivery in-state by its own trucks, all contacts by Miller Bros. with the Maryland customers were either by interstate facilities or by direct customer contacts out of the state of Maryland. The Court contrasted the facts found in *General Trading Co.* v. *State Tax Commissioner,* 322 U.S. 335 (1944), as being the case of "an out-of-state merchant *entering* the taxing state through traveling sales agents to conduct *continuous local solicitation* followed by delivery of ordered goods to the customers . . . ." In such a situation, it was stated, "[t]he Court could properly approve the State's decision to regard such a rivalry with its local merchants as *equivalent to being a local merchant.* 347 U.S. at p. 346. (Emphasis added.)

The Court noted, however:

> . . . there is a wide gulf between this type of *active and aggressive operation within a taxing state* and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. *Here there was no invasion or exploitation of the consumer market in Maryland.* 347 U.S. at p. 347. (Emphasis added.)

The Court further noted that although the Maryland residents undoubtedly incurred a liability for the use

tax when they used, stored or consumed the goods in Maryland, "the burden of collecting or paying their tax cannot be shifted to a foreign merchant in the absence of some jurisdictional basis not present here." 347 U.S. at p. 347.

Contrary to the assertion of the Board (Br. App. 20-23), there was no "defect" in the relationship between Miller Bros. and the Maryland residents, in the form of an "uncertainty" as to which purchases were to be used in Maryland, which prevented the transactions from being taxed. The facts in the case clearly show that of the $12,000 of furniture sold to Maryland residents during the taxable period July 1, 1947 through December 31, 1951, $8,000 was delivered by Miller Bros.' own trucks, and $1,500 was delivered by common carrier. 347 U.S. at pp. 350-351.

VII. NEITHER THE DE MINIMUS IN-STATE OVER-THE-COUNTER SALES DURING THE FIRST QUARTER IN ISSUE NOR THE IN-STATE ADVERTISING SOLICITATION ACTIVITIES HAVE ANY RELATION TO THE SOCIETY'S OUT-OF-STATE MAIL-ORDER SALES

As was stated in our opening Brief (pp. 8-9), during the nine month period ending May 6, 1964, $679.20 in maps, atlases, globes and books were sold over-the-counter from the Society's advertising office in San Francisco, while $2,161.85 of the same articles were sold from the Society's advertising office in Beverly Hills. The combined sales represent .63% of the Society's mail-order sales to California purchasers during the same period.[1] By way of contrast, in-state re-

[1] Based on over-the-counter sales totalling $2,841.05 during the period August 1, 1963 to May 6, 1964 and mail order sales to California totalling $452,470.00 during the same period. *See,* Stipulation of Facts, paragraphs 13 and 14, Appendix at 43a-44a.

tail sales from Sears' 12 Iowa retail department stores for the year 1936 amounted to $5,080,000, while mail order sales by Sears' to Iowa residents amounted to $5,900,000. *Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. at p. 362, fn. 3.[2]

The Society's local sales were regarded as *de minimus* by the California Court of Appeal and were disregarded by the Supreme Court of California. The suggestion by the Board (Br. App. 24) that the Society's over-the-counter sales bear the same relationship—assumed or otherwise—to its mail-order sales as was the case in *Nelson* v. *Sears, Roebuck & Co., supra,* is not worthy of further response.

Additionally, the Society's over-the-counter sales were terminated as of May 6, 1964, so that for the second taxable period in issue, July 1, 1964 through September 30, 1964, there are no in-state sales, *de minimus* or otherwise.

As for the Board's dispute as to whether the record adequately supports our assertion that the Society was not registered to do business in California, it can be safely assumed that if the Society were so registered, the Board would have produced evidence thereof. Moreover, the question of whether the Society *is* so registered would only be relevant, if, as was the case in *Nelson* v. *Sears, Roebuck & Co., supra,* the state of

[2] There is nothing in the record or this Court's decision in *Sears, Roebuck & Co.* to support the Board's assertion (Br.App. 24) that the Sears' mail-order sales were confined to the "outlying rural areas" of Iowa as compared to Sears' "urban" retail outlets. To the contrary, the Transcript of Record in *Sears, Roebuck & Co.* reflects that Sears did not maintain any records which would allow for such a distinction—rural vs. urban mail-order sales—to be made. *See,* Transcript of Record, October Term, 1940, No. 255, pp. 11-12; 60-61.

California was attempting to revoke such registration because of the Society's failure to remit to the state the use taxes in question. The Board's attempt (Br. App. 26) to minimize the controlling significance of Sears' qualification to do business in light of this Court's decisions in *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62 (1939), and *General Trading Co.* v. *Tax Commission,* 322 U.S. 335 (1944), is similarly unpersuasive. Both *Felt & Tarrant* and *General Trading* involved local sales agents soliciting the very sales orders which were being subjected to use tax thus providing the requisite nexus. In *Sears, Roebuck,* however, there was no *direct* local activity relating to the mail-order sales,[3] and the qualification of Sears to do business in Iowa was the critical benefit conferred by Iowa on Sears—a benefit lacking in *Felt & Tarrant, General Trading,* and the instant case—which provided the constitutional basis for upholding Sears' use tax collection liability.

VIII. THE NATIONAL GEOGRAPHIC SOCIETY DID NOT EXPLOIT THE MARKET IN A FASHION TO PROVIDE NEXUS FOR PURPOSES OF USE TAX COLLECTION LIABILITY

In *Miller Bros Co.* v. *Maryland, supra,* the Delaware retailer advertised in newspapers and on radio both of which were received to some extent in Maryland. This advertising was in addition to its sales circulars which

[3] The Iowa retail outlets of Sears had participated in the processing of certain mail order sales of Iowa customers. These particular sales were conceded by Sears to be subject to the Iowa use tax and, accordingly, were not a part of the mail order sales in issue. *See* Transcript of Record, fn. 2 *supra,* pp. 4-5, 7, 27-28. The involvement of the Sears' Iowa stores in such mail order sales underscores Sears' attempt to "departmentalize" its in-state, sales-related activities into taxable and non-taxable transactions. See *Nelson* v. *Sears, Roebuck & Co., supra,* 312 U.S. at p. 364.

were received by Maryland residents through the interstate mails.

In *National Bellas Hess* v. *Department of Revenue supra,* the company circulated its catalogue broadly throughout Illinois and also circulated advertising flyers on a frequent basis throughout the state by interstate mail. In neither of those cases were those facts sufficient to bring those companies under the taxing authorities' jurisdiction. Nor should it have been, for those cases were rightly decided. In the instant case the National Geographic Society's only approach in sales advertising was through the interstate mails by means of ads in its exempted publication, the "National Geographic" and promotion circulars on a limited basis in the same fashion. The same result should obtain here.

The assertion by the Appellee (Br.App.23) that the Society "specifically directed" an advertising campaign at California subscribers is false. All contacts with California purchasers were confined exclusively to facilities of interstate commerce which this Court has upheld as being permissable and beyond the taxing reach of the states.

CONCLUSION

It should be noted that the State of New York saw fit to file an amicus brief. It can best be disposed of by pointing out that it cites no cases not already cited by the principals insofar as the issues of this case are concerned. Its perorations concerning state's rights and its plea that the state is in need of funds should fall on deaf ears. Article 1, Section 8, clause 3 of the United States Constitution either stands for something or nothing; a state's desire to secure funds through its asserted taxing powers should have no influence on a

matter where a constitutional bar exists, as it does on the facts of this case. Revenue needs alone do not justify a curtailment of the degree of due process which is mandated by the Constitution before an out-of-state retailer can be held liable for taxes which the states choose not to collect from their own citizen-users.

On page three of its brief, the State reiterates the erroneous holding of the California Supreme Court and cites as the principal authority *Standard Pressed Steel Co.* v. *Washington Revenue Department* 419 U.S. 560 (1975). We have referred to this case in both our statement of jurisdiction and our brief in chief. We quote herewith the factual statement from the Court's opinion beginning at page 561 which we believe to be pertinent:

> Its principal customer in the State of Washington is the Boeing Company, in Seattle. In the years relevant here it had one employee, one Martinson, in Washington who was paid a salary and who operated out of his home near Seattle. He was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up any difficulties in the use of appellant's product after delivery. Martinson was assisted by a group of engineers of appellant who visited Boeing about three days every six weeks, their meetings being arranged by Martinson.

From the foregoing, it is abundantly clear that Mr. Martinson's involvement was directly related to and involved in the retail sales made to the Boeing Company irrespective of the fact that items sold to Boeing were shipped by mail from Standard's out-of-state plants.

It would be difficult to foresee under the doctrine of *Scripto, supra,* how there could be more direct in-

volvement than that set forth in the above stated quote. We believe the case was rightly decided and that it has no bearing on the facts of this case except to further distinguish the fact that the National Geographic Society had no local presence involved in the retail sales here in question.

Accordingly, for all the reasons stated in our statement of jurisdiction, our brief in chief and above, we urge that this Honorable Court reverse the decision of the Supreme Court of California and set forth in the decision of this Court a set of rules on this subject which will clearly delineate the farthest extent to which a state may reach in seeking tax revenue in this field. We believe that the Court of Appeal, First Appellate District of California reached the right conclusion. We urge this Court to support that conclusion.

Respectfully submitted,

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Appellee.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

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BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

Interest of *Amicus Curiae*

New York shares with California the type of use tax which might be jeopardized by an adverse decision here. Tax Law § 1110 imposes a compensating use tax on otherwise untaxed personal property purchased at retail. Section 1101 (b) (8) defines "vendor" in ways essentially similar to the California statute. Reversal of the holding of the court below would hamstring enforcement of this tax as applied to merchandise purchased by mail order. In New York such merchandise accounts for a substantial proportion of use taxes received by the State. Numerous out-of-state retailers have contacts in New York essentially

similar to those of appellant in this case, and a decision exempting such purchases from use tax would deprive this state of needed revenues and in addition subject New York businesses to increased untaxed competition from other states.

Opinion Below

The opinion below, dated April 1, 1976, is reported at 547 P.2d 458, 16 Cal. 3d 637, 128 Cal. Rptr. 682.

ARGUMENT

The California Supreme Court correctly held the use tax constitutional as applied to an out-of-state seller of merchandise maintaining business offices within the taxing state at which advertising for its publication is solicited and merchandise sold.

The California Supreme Court correctly held that the Society's maintenance in California of two offices from which employees solicited advertising for its magazine provided sufficient activity within California to impose use tax collection liability as to its mail order sales to California residents.

Appellant's attack on the use tax as violative of due process and the Commerce Clause is without merit. In repeated cases this Court has held that a use tax on interstate sales is valid so long as there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345; *Scripto, Inc.* v. *Carson,* 362 U.S. 207, 210-211. The controlling question is "whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 444; *Standard Steel Co.* v. *Washington Revenue Dept.,* 419 U.S. 560, 562.

The California Supreme Court properly held that "where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose upon the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so." 547 P.2d 458, 462.

This principle is borne out most graphically in *Standard Steel Co.* v. *Wash. Revenue Dept., supra,* 419 U.S. 560, where this Court declared that it "verges on the frivolous" to contend that the state has not given anything for which it could ask return where the only connection of the out-of-state seller with the taxing state, other than through instruments of interstate commerce, was the presence therein of one full-time engineer who advised the purchaser with regard to its need for a certain product ordered directly by mail and shipped by common carrier. Although that case involved a business and occupation tax the constitutional principle is indistinguishable. See also *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359; *Nelson* v. *Montgomery Ward,* 312 U.S. 373; *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, and *Scripto, Inc.* v. *Carson, supra,* 362 U.S. 207, all use tax cases.

The existence of business offices in the taxing state provides the same degree of presence as would retail outlets or salesmen. The benefits of these offices to the seller are direct and explicit—they attract the advertising revenue on which it heavily depends. The protection furnished these offices and their employees by the state in terms of building inspection, police, transportation, fire, sanitation and other services is legally indistinguishable from that furnished a retail store or sales office, and it is far greater

than that provided by the lone employee in *Standard Steel, supra.*

Appellant's argument that its activities in California are so dissociated from its mail order activities sought to be taxed that there is no justiciable relationship between the two must similarly be rejected. In the controlling case, *Nelson* v. *Sears Roebuck & Co., supra,* 312 U.S. 359, a New York corporation had retail stores in Iowa and conducted a mail order business directly between customers in Iowa and its offices outside Iowa. Rejecting Sears' dissociation argument, this Court stated (at 364):

> "Respondent cannot avoid that burden [use tax] because its business is departmentalized. Whatever may be the inspiration of these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

The "dissociation" argument, properly rejected in *Sears,* is no more convincing here. The cases cited by the Society as supporting its "dissociation" claim were properly distinguished by the California Supreme Court either as involving a defect in the relationship between the state and the company to be taxed, as in *American Oil Co.* v. *Neill,* 380 U.S. 451, or involving a tax imposed on the vendor rather than on the user, as in *Norton Co.* v. *Department of Revenue,* 340 U.S. 534. *Miller Bros.* v. *Maryland,* 347 U.S. 340, a case heavily relied on by appellant, was also properly distinguished by the California Supreme Court since the out-of-state seller's only contacts with the taxing state in that case were over-the-counter out-of-state sales.

New York, like California, has a vital interest in preserving its use tax in a meaningful form by continuing its applicability to the numerous companies maintaining business offices in New York while selling by mail to New York residents. The use tax provides New York with much-needed revenue by taking away from New York inhabitants the option of avoiding sales tax by resorting to untaxed or lower-taxed out-of-state purchases, and helping keep business in New York through protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices.

Were the decision of the lower court not to be upheld, the effectiveness of the use tax as a revenue producer would be seriously impaired. In this time when inflation and unemployment conspire to increase the states' burdens while their responsibilities continue, a decision undermining the effectiveness of the use tax would be devastating, encouraging price wars across state borders and depriving the states of revenues needed to maintain essential state services on behalf of their citizens.

New York also has a vital interest in preserving its sovereignty as a state within a federal system. This Court has long recognized the importance of preserving the integrity of the States. "The constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White,* 7 Wall. 700, 725, 19 L. Ed. 227 (Chief Justice Chase), quoted in the recent *National League of Cities* v. *Usery,* —— U.S. ——, 49 L.Ed. 2d 245, 253. In recent days, this Court has reaffirmed its conviction not to allow "the National government to devour the essentials of State sovereignty." *National League of Cities* v. *Usery, supra,* —— U.S. ——, 49 L.Ed. 2d 245, 259. See also *De Canas* v. *Bica,* 424 U.S. 351.

To determine whether State sovereignty has been impaired, the controlling question is whether the States' ac-

tions are "functions essential to separate and independent existence." *National League of Cities* v. *Usery, supra,* 49 L.Ed. 2d 245, 259. There can be no doubt that the power of the State to raise revenue through taxation is at least as crucial to the separate and independent existence of the States as its power to determine the wages of its employees (upheld in *National League of Cities* v. *Usery, supra*) or its power to prohibit employers from knowingly employing unlawful aliens where citizens would be adversely affected (upheld in *DeCanas* v. *Bica, supra*).

This Court long ago held:

> "the power of taxing the people and their property is essential to the very existence of [State] government, and may be legitimately exercised on the objects to which it is applicable to the whole extent to which the government may choose to carry it * * *. It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident."

Kirtland v. *Hotchkiss,* 100 U.S. 491, 497, quoting *McCulloch* v. *Maryland,* 4 Wheat. 316, 428-429. See also *Bode* v. *Barrett,* 344 U.S. 583, 585.

Anything short of affirmance of the judgment below could undercut the ability of the states to maintain their solvency and provide for the needs of their citizens without protecting any even remotely commensurate right on the part of an out-of-state vendor maintaining an office in the state where the purchases are made.

CONCLUSION

The judgment appealed from should be affirmed in all respects.

Dated: New York, New York, December 21, 1976.

Respectfully submitted,

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Supreme Court, U. S.
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No. 75-1868

In the

Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL GEOGRAPHIC SOCIETY,

Appellant,

vs.

BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From The Supreme Court Of The State Of California

MOTION TO PARTICIPATE AS AMICUS CURIAE

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MOTION TO PARTICIPATE AS AMICUS CURIAE

Direct Mail/Marketing Association, Inc., a national trade association, respectfully moves this Honorable Court for leave to file the attached brief *amicus*. The attorneys for petitioners and respondents have consented to such filing.

The Direct Mail/Marketing Association (DMMA) is an international trade association with a membership of over 1,700 firms located in 48 states plus 30 foreign countries. To meet their needs, DMMA provides educational meetings, special research and specific information

about ways members can effectively sell their goods and services more efficiently.

Direct mail can be and is used by nearly every business organization. Two of every three bulk mail permit holders are small companies doing less than $500,000.00 annually and ninety percent (90%) have fewer than 100 employees.

The United States Postal Service Revenue and Cost Analysis Division indicates that 2.49 billion catalogues were sent through the mail in fiscal 1973 and in 1974 the number sent through the mail reached 2.65 billion. It is estimated that sixty (60) billion dollars worth of goods and services are generated in sales through direct mail each year, and members of the association do seventy percent (70%) of this volume. Thus, members of the association are constantly engaged in interstate commerce and are subject to the interpretations on jurisdiction with which this litigation is concerned.

The opinion of the Supreme Court of California has added additional confusion and uncertainty to a field of law already noted for its amorphous quality. The parties herein are properly concerned with establishing their position on the facts of the case. DMMA, however, respectfully requests that the Court, in considering the specific issues in the case, also give consideration to the broader aspects of the problem.

In view of all these factors, your petitioner believes that research and expression of opinion by independent counsel representing persons engaged in and concerned with interstate commerce will be helpful to this Court.

Petitioner represents that it has received the consent of National Geographic Society and the Board of Equalization of the State of California to his filing of a brief

as *amicus curiae* and requests permission to intervene for the purpose of filing instanter a brief as *amicus curiae,* urging reversal of the decision of the California Supreme Court and in support of the appeal filed by National Geographic Society.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF DIRECT MAIL/MARKETING ASSOCIATION, INC. URGING REVERSAL

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QUESTIONS PRESENTED

This case presents questions which go to the very heart of the constitutional requirement for an orderly system of taxation of interstate commerce that does not seriously impede the free flow of commerce. The questions necessarily include the following:

1. Whether the adoption of the "slightest presence" test as formulated by the California Supreme Court violates the constitutional prohibition against impediment

to the free flow of commerce between the 50 states with respect to retail sales made by interstate mail.

2. Whether the adoption of the "slightest presence" test by the California Supreme Court effectively discards the "dissociation" test conflicting with the minimum nexus requirements set forth by this Court in *American Oil Co.* v. *Neill et al,* 380 U.S. 451 (1965) and other cases decided by this Court.

INTEREST OF AMICUS CURIAE

The interest of Direct Mail/Marketing Association, Inc. as *amicus curiae* is set forth in the Association's motion for leave to file this brief *amicus,* to which motion this brief is annexed.

ARGUMENT

The Imposition Of Use Tax Collection Liability Upon An Out-Of-State Mail Order Seller Based Upon The "Slightest Presence" Of The Seller Within The Taxing State Is In Violation Of The Due Process Clause And The Commerce Clause Of The United States Constitution.

Any corporation doing an interstate business is faced with a barrage of taxes of various kinds asserted by states other than its own, and must frequently consider a demand from a state thousands of miles away. In attempting to assess the probable validity of this demand, the businessman and his counsel need guidance. This is especially true of the out-of-state mail order seller whose only selling activity is through the use of the U.S. mails.

The number and kind of interstate businesses are described in the June 15, 1964 published Report on "State Taxation of Interstate Commerce" (here called "Subcommittee Report") by the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the House of Representatives. It concluded that not fewer than 120,000 firms were engaged in interstate commerce, and that the number could very well be 200,000. Of these, ". . . a majority appear to be companies with less than one million dollars of annual sales, and about half appear to have fewer than twenty employees. Very substantial proportions have annual sales of less than $500,000 and fewer than ten employees" (Subcommittee Report, Page 75). The overwhelming majority have places of business in only one State. Yet even among the smallest manufacturers, the typical interstate company has markets at some distance from its home plant, and ships its products into several states (Ibid, Page 76).

These businesses are faced with a nation-wide network of complex taxes. Forty-five states and the District of Columbia require out-of-state sellers to collect use taxes on sales made in the state, with many tests for determining liability of the out-of-state seller to collect such taxes. Local taxes must also be added to this number of tax jurisdictions which impose varying tests for collection liability.

To say that these tests are something less than definite is to understate the matter. As the Subcommittee Report referred to above summarized the matter, "In the majority of States neither statute nor regulation furnishes a sufficient description of the circumstances in which a corporation is liable to enable it easily to determine whether it is subject to tax liability." (Report, Page 142). Truly, it would require a staff of accountants and lawyers to attempt to bring some order out of the statutory chaos.

But the Congressional Subcommittee found that the "typical interstate business is not a corporate giant with a large tax department and refined electronic data-processing equipment." (Report, Page 75). Quite the contrary: "The vast majority of multistate businesses are not presently equipped to deal with State and local taxation on a very complex level. The typical interstate company is characterized by substantial use of hand work in its tax accounting, little in the way of professional tax assistance, and an almost complete absence of systematic tax planning. Sophisticated systems of accounting and tax handling occur only among the very large" (Report, Page 87).

This Court anticipated the problem in *National Bellas Hess, Incorporated* v. *Department of Revenue,* 386 U.S. 753 (1967) wherein it stated:

> "Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government.'"

If the "slightest presence" test of the California Supreme Court is to be applied, mail order sellers would be subjected not only to state and local use tax collection, but also state and local gross receipts taxes, gross income and flat fee license taxes.

It is respectfully suggested that in the instant case, the California Supreme Court has created further uncertainty in a field of law already noted for its amorphous quality.

This uncertainty may result from a kind of oversophistication on the part of both the Bench and the Bar, which takes the form of a constant re-examination and refinement of opinions enunciated by this Court.

In *Colonial Pipeline Company* v. *Traigle,* 421 U.S. 100 (1975), this Court took note of the need for clear legal distinctions in the area of taxation of interstate commerce in stating that present distinctions fail to provide what

taxpayers and the lawyers who advise them have a right to expect, namely, a firm and solid basis of differentation between that which runs afoul of the Commerce Clause and that which is consistent with that Clause.

In our contemplation of the thousands of words which make up those opinions, we tend to forget the Constitution itself, and the basic principles of Constitutional Law which are dictated by it.

We must begin here with the principle that the Commerce Clause prohibits state taxes, however measured, upon the privilege of carrying on a business that is exclusively interstate in character. When the contention is made that a state tax is invalid for this reason, the first proper area of inquiry is simply whether or not the business is in fact interstate in character, and whether the tax is one on the privilege of carrying on that business. *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 609 (1951).

However, it is not constitutionally sufficient to stop at this point and apply rules based upon this consideration alone. In considering the issue, both the Due Process Clause and the Commerce Clause must be applied. As this Court stated in *National Bellas Hess, Inc.* v. *Department of Revenue* (supra):

"These two claims (Due Process and Burden on Interstate Commerce) are closely related."

In considering both claims, this Court said at page 756:

> "For the test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a State's compliance with the requirements of due process in this are similar (citation omitted).

> As to the former, the Court has held that 'State taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys' (citation omitted). And in determining whether a state tax falls within the confines of the Due Process Clause, the Court has said that the 'simple but controlling question is whether the state has given anything for which it can ask return.' (citations omitted). The same principles have been held applicable in determining the power of a state to impose the burdens of collecting use taxes upon interstate sales. Here, too, the Constitution requires 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' (citations omitted)."

And as stated by the Court in *Miller Bros. Co.* v. *Maryland,* 347 U.S. 34 (1954):

> "The collection of the use tax from inhabitants is a difficult administrative problem, and if out-of-state vendors can be compelled to collect it and remit it to the taxing state, it simplifies administration. But this raises questions of great importance to particular taxpayers, to the course of commercial dealing among the states and as an appropriation by other states of tax resources properly belonging to the state where the event occurs."

Thus, it is clear that a test based upon the "slightest presence" in a state, no matter how inconsequential or no matter what the degree of relationship to the activity sought to be taxed may be, cannot prevail when evaluated in the light of the requirements of either the Commerce Clause or the Due Process Clause. This Court has consistently refused to equate "minimum" with "slightest," for in the one a certain quantum and character of activity

is required whereas in the other, any activity may be the actuating mechanism for tax collection liability. See *Miller Brothers Company* v. *Maryland* (Supra), *Connecticut General Life Insurance Company* v. *Johnson*, 303 U.S. 77 (1928), *Norton Company* v. *Department of Revenue*, 340 U.S. 534 (1951).

In the case of out-of-state mail order sellers, the presence of purchasing agents in a state, or the printing of a catalog in a state, or the purchase of business insurance in a state, or the attendance by corporate officers at a seminar in a state, or the presence of a delivery vehicle in the state, or the use of a local post office in a state, or the one-time use of commercial banking facilities in a state could create a "slightest presence" no matter how temporary or non-recurring such activities may be in that state. Such activities are not directly related to sales activities in that state but as with all business activities, the sum and substance of all activities, are either directly or indirectly related. It is submitted that the only constitutionally valid test of "presence" for the purpose of conferring use tax collection liability is a continuous activity directly related to the activity sought to be taxed.

It is further submitted that the activities recited herein, while properly classed as business activities, do not constitute such a continuous and directly related presence as to confer use tax collection jurisdiction on the state wherein such unrelated activities are performed.

The "Slightest Presence" Test Effectively Discards And Conflicts With The "Dissociation" Doctrine Adopted By This Court As A Test Of Minimum Nexus For Imposition Of Tax Liability.

The problem of the existence of a jurisdictional nexus is critical to the thousands of businesses engaged in interstate selling through the use of the U.S. mail. The statutory nexus requirements for determining under what circumstances an out-of-state seller will be required to collect a use tax cover a wide range and require an affirmative, clear and concise delineation in order to comply with the constitutional requirements of the Commerce and Due Process Clauses.

This Court has wisely adopted a basis upon which jurisdictional nexus can be reached, and in so doing has clearly set forth those activities that do not confer such jurisdiction. In-state activities of a seller that are not sales related are said to be 'dissociated" from the out-of-state sales and cannot provide the constitutionally needed nexus for taxing such sales. See *Norton Company* v. *Department of Revenue* (Supra), *American Oil Company* v. *Neill* (Supra), and *Connecticut General Life Insurance Company* v. *Johnson* (Supra).

The doctrine of "dissociation" is firmly rooted in the decisions of this Court, beginning with the *Connecticut General Life Insurance Company* case. In that case, California was attempting to tax out-of-state transactions of reinsurance not specifically related to any of the taxpayer's activity in the state.

The State of California imposed an annual tax on every insurance company, doing business within the State, of 2.6% of the amount of the gross premiums received upon its business done in the State less return premiums and

reinsurance in companies or associations, authorized to do business in the State. Taxpayer in this case was a Connecticut corporation, admitted to do an insurance business in California. In addition to that business, conducted in the State, it made contracts with other insurance corporations, likewise licensed to do business in California, reinsuring them against loss on policies of life insurance, effected by them in California and issued to California residents. But these reinsurance contracts were entered into in Connecticut, where the premiums were paid and losses were payable.

The Supreme Court of California held that the measure of the California tax also included in the premiums on Taxpayer's reinsurance policies effected and payable in Connecticut. This Court reversed the decision of the Supreme Court of California on the ground that the reinsurance business of taxpayer was not connected with the local insurance business that it did in California for the following reason:

> "Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California (citations omitted). Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.
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> • • • • •

> "The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

Subsequently, in *Norton Company* v. *Department of Revenue* (Supra), this Court again affirmed the doctrine of "dissociation" stating at page 537 that:

> "Unless some local incident occurs *sufficient* to bring the transaction within its taxing power, the vendor is not taxable." (Italics added).

In *Norton,* this Court established the rule that taxation of an out-of-state company on local sales can only be avoided by showing that particular transactions are "dissociated" from the local business and are interstate in nature. In the determination of the interstate activities involved, this Court stated on page 539 that:

> "The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester."

Thus, it is clearly established that the local incident necessary to confer jurisdictional nexus must be sufficient in nature, not merely a scintilla of activity as the California Supreme Court holds in asserting its doctrine of "slightest presence" and further, this Court recognizes that local and interstate activities must be "dissociated" for purposes of imposing tax liability.

In *American Oil Co.* v. *Neill* (Supra) this Court reaffirmed its position that imposition of a tax upon a dealer entirely "dissociated" from any in-state activities violated the Due Process Clause. The question again was the suffi-

ciency of the relation of in-state activities to those activities sought to be taxed. On page 457, this Court stated that:

> "More than once this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be *insufficiently related* to activities within the taxing State. (Citations omitted) (Italics added).

Citing cases dealing with a use tax, a gross receipts tax and a sales tax, this Court said on page 458 that:

> "These cases have also firmly established the doctrine that when a tax is imposed on an out-of-state vendor, 'nexus' between the taxing State and the taxpayer is the outstanding prerequisite on state power to tax. Consistent with this requirement there must be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' (Citation omitted). Granted that when a corporation, pursuant to permission given, enters a State and proceeds to do local business the 'link' is strong. In such instances there is a strong inference that it exists between the State and transactions which result in economic benefits obtained from a source within the State's territorial limits. *The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be 'dissociated from the local business.' Norton Co.* v. *Department of Revenue,* supra, at 537, and therefore may not, consistent with due process, be taxed." (Italics added).

What is important according to the ruling of this Court in this case is a determination of whether the in-state activities contributed in any way to the procurement or performance of the contract. It is respectfully submitted

that this requirement of contribution to procurement or performance seeks a direct relationship with the activities to be taxed and does not, as the "slightest presence" doctrine formulated by the California Supreme Court would, permit imposition of use tax collection liability on the basis of any activity in the taxing State. To the interstate mail order seller, this issue is vital. To permit imposition of use tax collection liability on the basis of any in-state activity, however remote and unrelated, would destroy the constitutional guarantees of due process and freedom from impediment of interstate commerce which have been consistently upheld in this Court in its decisions establishing the "dissociation" doctrine and requiring minimum nexus.

Conclusion

The growth of our society has placed increasing demands on our State and local governments. Population expansion, particularly in our cities and towns, has burdened local jurisdictions with demands for increased public services—in the form of schools, roads, sewers, fire and police protection. State and local governments, in meeting these demands have had to open new resources of revenue, the proliferation of which have seriously threatened an orderly system of interstate commerce operating under time-honored concepts with respect to taxation of interstate commerce that have been established by this Court over the years.

It is respectfully submitted that the need for revenues does not justify an unconstitutional means to obtain such revenues and that however powerful those needs, States

and their local governments may not set aside the basic requirements of the Constitution with respect to the jurisdictional reach of the States and their local governments. The doctrine of "dissociation" enunciated by this Court lays down guidelines upon which this jurisdictional reach may be extended to the interstate mail order seller and the replacement of this sound doctrine by adoption of a new theory of "slightest presence" cannot stand the constitutional tests required by the Commerce and Due Process Clauses. It is respectfully submitted that on the basis of arguments presented herein, the "slightest presence" doctrine as adopted by the California Supreme Court for application to the interstate mail order sellers is a nullity as it conflicts with the most explicit constitutional inhibitions as heretofore set forth by this Court.

Respectfully submitted,

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